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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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ROBERT M. CAVANAUGH, and
MARTHA E. CAVANAUGH,

*Petitioners,*

v.

WESTERN MARYLAND RAILWAY COMPANY
AND BALTIMORE AND OHIO
RAILROAD COMPANY,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the majority opinion of the Fourth Circuit which permits a railroad to counterclaim for property damage against its injured employee in an action brought under the Federal Employers' Liability Act violates the express terms of the statute and undermines its remedial purpose.

2. Whether the Federal Employers' Liability Act prohibits a railroad from satisfying any judgment it receives in a negligence action against an injured employee from that employee's FELA award.

## PARTIES

The only parties present in this petition are Robert M. Cavanaugh (Petitioner, Appellee Below) and Western Maryland Railway Company and Baltimore & Ohio Railroad Company (Respondents, Appellants Below).

Mr. Cavanaugh's wife, Martha E. Cavanaugh, plaintiff, brought her individual claim against the defendants for loss of consortium in the same civil action. As no counterclaim was asserted against Mrs. Cavanaugh, her claim was not addressed in the appeal to the Fourth Circuit and is not a part of this petition.

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## OPINIONS IN COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case has not yet been published in official form. The court's slip opinion, which includes the majority opinion and the dissent, is reproduced in the Appendix to this petition. *Robert M. Cavanaugh and Martha E. Cavanaugh v. Western Maryland Railway Company and Baltimore and Ohio Railroad Company,* No. 82-1637, (4th Cir., February 29, 1984).

The United States District Court for the Northern District of West Virginia, at Martinsburg, which granted

petitioner's motion to dismiss the respondents' counterclaim, entered a brief order which is reproduced in the Appendix. Additionally, the court's oral ruling made from the bench on March 24, 1982 has been transcribed and is reproduced in the Appendix.

## GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in this case was dated and entered on the 29th day of February, 1984. No motion for rehearing was made, and no extension of time for filing this petition was requested.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1254(1) (1982) to review the judgment by writ of certiorari granted upon timely petition of a party (here, Robert M. Cavanaugh, Appellee Below).

The judgment of the United States Court of Appeals for the Fourth Circuit is final with respect to the issues presented in this petition. The appellate court's judgment is ripe for review at this time.

## STATUTES

### FEDERAL EMPLOYERS' LIABILITY ACT TITLE 45, UNITED STATES CODE

**§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Ter-

ritories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

**§53. Contributory negligence; dimunition of damages**

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That

no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violations by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

### §54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

### §55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

### §56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

### §60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to avoid any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

**FEDERAL RULES OF CIVIL PROCEDURE, RULE 13(a)**

**(a) Compulsory Counterclaim**

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

## STATEMENT OF THE CASE

The present litigation arises from a head-on collision occurring at 5:55 a.m. on Feburary 12, 1980 in West Virginia between two freight trains operated by defendant Baltimore & Ohio Railroad Company ("B & O"). Plaintiff, Robert M. Cavanaugh, was employed by defendant Western Maryland Railway Company ("Western Maryland") as engineer of the east-bound train involved in the collision. He suffered serious and permanently disabling injuries.

On the date of the collision, Mr. Cavanaugh was sixty years old and was commencing his fortieth year of service to Western Maryland. The two railroads belong to the same railroad holding company.

On December 31, 1981, Mr. Cavanaugh filed an Amended Complaint against his employers, Western Maryland and B & O, in the United States Court for the Northern District of West Virginia at Martinsburg, pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*(1976) ("FELA") seeking One Million Five Hundred Thousand Dollars ($1,500,000.00) in compensatory damages. Mrs. Cavanaugh brought her individual claim against the defendants for loss of consortium in the same civil action. Defendants Western Maryland and B & O filed their Answer and, in addition, filed a counterclaim against Mr. Cavanaugh asserting a claim for property damage in the total sum of One Million Seven Hundred Thousand Dollars ($1,700,000.00).

Western Maryland and B & O also impleaded Mr. Cavanaugh as a third-party defendant in two other FELA actions arising from this collision filed in the United States District Court for the District of Maryland subsequent to Mr. Cavanaugh's Complaint: *Joseph Cucchiara v. The Baltimore and Ohio Railroad Company,* Civil Action No. H-82-635 (D.Md.), Third-Party Complaint filed April 29, 1982; and *William A. Roelkey v. Baltimore & Ohio Railroad Company v. Robert Cavanaugh,* Civil Action No. M-83-349 (D.Md.), Third-Party Compalint served March 8, 1983. In these suits, the defendants are seeking indemnification or contribution from Mr. Cavanaugh for any liability adjudged. They also filed counterclaims against Mr. Cavanaugh for property damage. The defendants also filed a claim for property damage against Mr. Cavanaugh in Maryland state court, *The Baltimore and Ohio Railroad*

*Company and Western Maryland Railway Company v. Robert M. Cavanaugh,* No. 13028, Law Docket No. 20 (Washington County, Md.), Declaration filed February 9, 1983. All of these actions were informally stayed pending resolution of Mr. Cavanaugh's appeal.

Mr. Cavanaugh filed and served his Motion to Dismiss Defendants' Counterclaim on February 19, 1982. Following the receipt of briefs from the parties, oral argument was held on March 14, 1982. By Order entered June 16, 1982, the district court dismissed the counterclaim. Judge Maxwell's decision states in pertinent part as follows:

> As is more fully set forth in the record, the court is of the opinion that the Federal Employers' Liability Act, 45 U.S.C. §§51, et seq., was intended by Congress to be the exclusive remedy for injured railroad workers. Examining the Act in its entirety, a counterclaim against the injured employee would seemingly violate §55 of the Act, which prohibits the employment of any device, the purpose of which would be to enable the railroad to exempt itself from the liability created by the Act, and thus would be contrary to public policy.

Appendix D at 23a.

After the district court entered a final judgment dismissing the defendants' counterclaim, defendants appealed to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1291 (1982). Following briefing and oral argument, a three-judge panel of the appellate court, with a dissent by the Honorable K.K. Hall, reversed the district court's judgment on February 29, 1984, reinstated the defendants' counterclaim and directed that the counterclaim be tried separately, al-

though the severance issue had not been raised at the district or appellate level.

The Fourth Circuit held that the Federal Employers' Liability Act did not contain explicit language barring the railroads from asserting a counterclaim against Mr. Cavanaugh for the property damage sustained as a result of the collision. Neither did the language implicitly prohibit such a counterclaim, according to the court. The court reasoned that Section 55 of the Act, which voids "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created" is limited to employment contracts and the like and does not include counterclaims. The court scoffed at the idea that the legislative purpose to prevent coercion or intimidation of an injured employee would be undercut by permitting the railroad to counterclaim and characterized as a "fanciful notion" the assertion that the maintenance of the counterclaim will prevent the injured employee from securing a fair award.

The court buttressed its holding with a hodgepodge of judicial decisions ranging from an unpublished two-page order cursorily denying a plaintiff's motion to dismiss the railroad's counterclaim to a state supreme court opinion which specifically declined to reach the issue controverted here: whether the FELA prohibits the railroad from counterclaiming for property damage. The court rejected the reasoning of the only other appellate court to specifically consider the issue. *See Stack v. Chicago, M. St. P.& Pac. R.R. Co.*, 94 Wash.2d 155, 615 P.2d 457, 459 (1980).

Two judges of the Fourth Circuit have decided an important question of federal law which has not been, but should be, settled by this Court. The FELA is the exclusive legal remedy for injured railroad workers. This Court has

historically taken the lead in interpreting the statute and putting flesh upon its bare bones, ever mindful of the overriding purpose of the statute to compensate injured workers. If, as Mr. Cavanaugh asserts, the railroad's use of the counterclaim for property damage undermines the purpose and is, in fact, prohibited by the statute, the Court must act now. The effect of the Fourth Circuit's majority opinion extends far beyond Mr. Cavanaugh's current plight. The chance for thousands of railroad employees who are or may become injured to be recompensed will be diminished. Even if the majority opinion reached the right result, the importance of this issue demands a thorough analysis and a soundly reasoned decision which can only come from this Court. The majority opinion currently conflicts with at least one state supreme court opinion. Such conflicting decisions promote manipulation by the railroads, who operate regionally or nationally, and leave railroad employees subject to radically different legal standards, which is abhorrent to the goal of Congress and this Court of uniform application of the FELA.

## ARGUMENT

### ISSUE I

Although the precise issue decided by the district court was whether the railroads could counterclaim for property damage in Mr. Cavanaugh's FELA action, the appellate court's majority opinion reached two interrelated issues: (1) Are railroads entitled to initiate negligence actions against their employees for property damage; and (2) May the railroads raise such negligence actions by way of a counterclaim in an FELA suit. The majority opinion rea-

soned that since the common law[1] permitted an employer's negligence action against its employee, Rule 13(a) of the Federal Rules of Civil Procedure mandated such action be brought as a counterclaim. Further, the FELA interposed no bar to a negligence action against the employee in general; nor to a counterclaim in an FELA action brought by the injured employee. To the contrary, plaintiff asserts that the specific language of the FELA and its underlying remedial objectives bar such negligence actions in general and, specifically, as counterclaims to an FELA suit.

Petitioner begins with three basic principles. First, Congress intended that injured railroad workers be compensated for their work-related injuries (regardless of the degree of their negligence) as long as the railroad's negligence contributed to the injuries. A worker's negligence serves only to reduce the damage award in proportion to the amount of his or her negligence. *See* 45 U.S.C. §§ 51, 53. Congress understood that human injury is an "inescapable expense of railroading" and sought through FELA to adjust equitably that expense between the worker and the carrier, who is economically more suited to bear the burden. *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 330-31 (1958).

Second, Congress recognized that the railroads were prone to use coercive tactics to avoid their liability, such as requiring outright waivers by the employees as a condition of employment, applying pressure and threats against em-

[1]Although none of the parties found a West Virginia state court decision in which an employer sued its employee for negligence, the Fourth Circuit majority opinion found dispositive a case wherein an insurance company sued an independent insurance agency for negligence, in writing an insurance policy based upon principal/agency theory. *National Grange Mutual Ins. Co. v. Wyoming County Ins. Agency, Inc.*, 156 W.Va 521, 195 S.E.2d 151 (1973).

ployees who filed damage suits and establishing regulations making it difficult for the injured employee to investigate his negligence action. To prevent such overbearing methods, Congress included Section 55, which voids "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter" and Section 60, which prohibits any attempt to prevent a person from voluntarily furnishing information about an accident.

Third, as recognized by this Court, Congress did not create in the FELA a static remedy, but one "which would be developed and enlarged to meet changing conditions." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958).

The majority opinion of the Fourth Circuit does violence to all three principles. First, the plain language of Section 53 of the Act states that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery." Congress clearly contemplated that a railroad worker whose own negligence contributed to his or her injuries, and most likely also caused property damage, should be entitled to an award reduced in proportion to his or her own negligence. In a "contributory negligence" jurisdiction, a finding of some negligence on the part of the railroad, which would nevertheless entitle the worker to an FELA award, would bar any recovery on the employer's property damage claim against the employee. However, in a jurisdiction such as West Virginia, which has recently adopted the comparative negligence doctrine, even a finding of substantial negligence on the part of the employer, though less than fifty percent, would be likely to offset totally any recovery awarded to the

employee, simply by the sheer magnitude of property damage claims in railroad accidents.

The majority of the Fourth Circuit panel was unable to grasp this simple point when it stated that if the railroads were prohibited from asserting their counterclaim, "they could be denied any right of action ever to recover for the damages to their suffered as a result *exclusively* of plaintiff's negligence. . . ." Appendix B at 6a [emphasis supplied]. And later the majority repeated its erroneous assumption that such property claims could only be maintained if the railroad worker were totally negligent when it stated, "[Congress] could as easily, had it intended such result, have barred the defending railroad from asserting by a counterclaim in such action its own claim for damages against the suing plaintiff for damages caused *wholly* by the negligence of that plaintiff, but it did not choose to do so." Appendix B at 7a [emphasis supplied].

Second, the Fourth Circuit's majority opinion adopted a narrow, formalistic interpretation of Sections 55 and 60 which is oblivious to the reality of the situation: The railroads' use of the property damage claim is a blatantly coercive device to discourage injured workers from instituting the FELA actions and to force FELA plaintiffs to settle their lawsuits on terms favorable to the employer. Although the majority opinion found it "no easy feat of linguistics" to accept plaintiff's argument that the defendants' counterclaim was a "device" prohibited by Sections 55 and 60, it is even more difficult to follow the majority's tortured logic. The majority opinion found that the word "device" was defined in Section 55 as a "contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter." The ma-

jority concluded that because a counterclaim is "plainly" not an exemption from liability, it is not a device within the scope of the Act. And, the majority added, the legislative history demonstrated that in Section 55, Congress simply contemplated employment contracts in which employees expressly released the railroads from any liability. Appendix B at 8a-9a.

The enactors of the FELA did not share the myopic view of the Fourth Circuit majority. Aware of the railroads' history of avoiding liability to its employees through unfair methods, Congress deliberately included the catch-all phrase "device," coupled with "whatsoever," to make clear its intent that the courts broadly construe the word, which simply means a plan or scheme for achieving something. *Oxford American Dictionary* (1980). *See, e.g.*, 18 U.S.C. § 1001 (1982). ("Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact. . . .") The fact that the device is a counterclaim, not a contract or agreement, is irrelevant as long as its purpose is to prevent employees from fully asserting their rights under the FELA.

Judge Hall,in his dissent, agreed with the Washington Supreme Court in its unanimous *en banc* decision that a counterclaim is a "device contrived to deprive plaintiffs of their right to an adequate recovery and operated to chill justifiable FELA claims in violation of 45 U.S.C. 55." Appendix B at 16a, citing *Stack v. Chicago, Milwaukee, St. P. and Pac. R.R. Co., supra,* 615 P.2d at 457.[2]

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[2]The *Stack* court also held that the railroad' practice of counterclaiming and impleading an employee as a third-party defendant in an FELA action would inhibit the employee from voluntarily

This chilling effect not only discourages an injured worker from asserting an FELA claim, but makes it difficult for him or her to find an attorney to prosecute the action. An injured railroad worker usually has insufficient funds to pay an attorney and representation is secured through a contingency fee arrangement. As a result of the majority opinion, there is a strong possibility that any FELA recovery, no matter how meritorious, would be swallowed up by a counterclaim. Also, the client may require representation in numerous other FELA suits and property damage claims. The attorney must participate in these proceedings to avoid any preclusive effect on the client's own FELA litigation. This scenario is not an imaginative specter; it is Mr. Cavanaugh's current status. These problems are not simply risks inherent in any personal injury case. FELA plaintiffs are entitled to a recovery even if they are contributorily negligent beyond forty-nine percent. In addition, the dollar amount of property damage in railroad accidents often exceeds the claim for personal injuries.

Even if Congress had not specifically contemplated a railroad's use of the property damage claim as a coercive device, the majority opinion's interpretation of Sections 55 and 60 ignored the third principle: The Act is merely a framework within which the federal courts are charged with the development of specific rules to effectuate the goal of compensation to injured workers "consistent with

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providing information concerning the accident in violation of Section 60. *Accord: Shields v. Consolidated Rail Corp.*, 81-4204 (S.D.N.Y. Dec 16, 1981) (Appendix F of this petition). Although no third-party claim has been raised in the Northern District of West Virginia litigation, Mr. Cavanaugh has been impleaded in two other FELA suits, which is a logical extension of the Fourth Circuit majority opinion's holding that a railroad worker is liable to the railroad for all damages he or she negligently caused.

the changing realities of employment in the railroad industry." *Kernan v. American Dredging Co., supra,* 355 U.S. at 437. Congress cannot be faulted for failing to foresee property damage claims by the railroads. As of 1966, a leading treatise could find only one reported decision involving a railroad counterclaim. 11 *Am Jur Trials* § 105 at 562, citing *Capitola v. Minneapolis, St. P. & S. Ste. M. Ry.,* 258 Minn 206, 103 N.W.2d 807 (1960).[3] But by using broad language in Sections 55 and 60 and by evincing a strong intent that the railroads not be permitted to evade their liability under FELA, Congress left it to the courts to protect the railroad employees against newly devised tactics.

Again, this situation is not simply a dire possibility. It has already happened. Following a severe accident in Wyoming on April 22, 1984, the railroad sued two surviving crew members for property damage on April 24, 1984. *Burlington Northern R.R. Co. v. Jerry M. McNaulty and W. Keith Young,* 84-0162 (D.C. Wyo.).

Property damage claims by a railroad would also distort Section 53 which provides that an employee shall not be held contributorily negligent in a case where the railroad violated a safety statute. This Court has held inapplicable to FELA actions the common-law rule that violation of a statutory duty creates liability only when the statute was intended to protect an injured person from the type of injury in fact incurred. *Kernan v. American Dredging Co., supra,* 355 U.S. at 438-39. However, in a negligence action against the employee conducted under state common law,

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[3]Ironically, adoption of the doctrine of comparative negligence by a growing number of state jurisdictions, which is intended to benefit injured victims, has also opened the door to the use of the property damage claim tactic by the railroads.

the railroad would not be held similarly accountable. Thus, even where the railroad has violated a safety statute, the fact-finder could determine that the worker was entirely negligent and the railroad not negligent at all. Not only might this preclude the employee from relitigating the negligence issue in an FELA action, but the employee would be forced to pay the consequences of his or her negligence in the form of a judgment against him or her for property damage in direct violation of Section 53. To the extent an award to an injured railroad employee is directly or indirectly diminished by a property damage judgment under state law where the railroad violated a safety statute, Section 53 is undermined.

Judge Hall understood this duty when he wrote in his dissent the following:

> To allow that railroads' counterclaim to proceed would pervert the letter and spirit of the FELA and would destroy the FELA as a viable remedy for injured railroad workers. The result sought by the railroads, and accepted by the majority, defies common sense and is repugnant to the general goal of the FELA to compensate railroad workers for injuries negligently inflicted by their employers.

Appendix B at 18a.

The holding of the Fourth Circuit's majority opinion permitting railroads to maintain property damage claims corrupts FELA in other ways which shall be mentioned briefly. The railroads now have the opportunity to choose a forum favorable to their claim, e.g., one with a modified or pure comparative negligence standard. Then they can immediately file suit and obtain a negligence determination which would preclude a separate determination in the

employee's FELA suit. This race to the courthouse violates the right of injured employes to bring suit within three years of the injury, § 56, and to choose a state or federal forum, *Id.*

If railroads are permitted to maintain property damage suits against an injured employee, the FELA's goal of nationwide uniformity will be destroyed. *See, Norfolk & Western R.R. Co. v. Liepelt,* 444 U.S. 490, 493 n. 5 (1980) ("One of the purposes of the Federal Employers' Liability Act was to 'create uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees.' HR Rep No. 1386, 60th Cong. 1st Sess, 3 (1908)"). For the ultimate amount an injured employee will recover will depend upon the negligence laws of the state chosen by the railroad for its lawsuit, e.g., contributory, pure comparative or modified comparative negligence standards. Congress did not intend such uncertainty in injury compensation to exist.

If, as Mr. Cavanaugh asserts, FELA prohibits a railroad from maintaining an ordinary negligence action against an injured employee for property damage in any court, *ipso facto,* the railroads improperly counterclaimed against Mr. Cavanaugh in his FELA action. When the property damage claim is used as a counterclaim, the coercive nature of the scheme is all too evident. Such a claim not only can pressure an FELA claimant into dropping his or her claim, but it looms as a threat to any other employees involved in the same accident or subsequent accidents. Additionally, the common law practice of setting off judgments against one another when the counterclaim is also successful starkly reveals the railroads' purpose of depriving an injured employee of his or her rightful recovery. It is telling that defendants did not assert their

property damage claim until Mr. Cavanaugh brought his FELA action, almost two years after the railroads suffered their property loss.

But a counterclaim also undermines the Act in ways a separate action may not. If an injured worker timely files an FELA action, but the forum state's property damage statute of limitations has run, some jurisdictions permit stale counterclaims to be brought for recoupment purposes only, not as independent causes of action. *See,* Wright and Miller, *Federal Practice and Procedure,* Civil § 1419. The goal of nationwide uniformity would again be defeated, and a railroad's intent to avoid liability would be successful in some states.

Finally, if the Fourth Circuit majority opinion is correct in holding that the railroads' property damage claim against Mr. Cavanaugh is a compulsory counterclaim under Rule 13(a) of the Federal Rules of Civil Procedure, then the converse must also be true: when a railroad brings a negligence action against its injured employees first, the employees are required to counterclaim with their FELA claims. The Wyoming lawsuit initiated by Burlington Northern serves as an illuminating example. The railroad filed its lawsuit within two days of the accident. If the defendants must counterclaim for damages under FELA, they must quickly retain an attorney in a forum not of their choosing and at a time when they may not know the extent of their injuries. The rights accorded them in the statute, such as the three-year statute of limitation and choice of forum, have vanished.

Should this Court find that a railroad is entitled to bring an ordinary negligence action against an injured employee, it should still hold that the FELA bars maintenance of the claim as a compulsory counterclaim. *See,*

*e.g., Caleshu v. United States,* 570 F.2d 711 (8th Cir. 1978) (Rule 13(a) cannot be applied to force government to bring counterclaim to reduce unpaid assessments to judgment in a taxpayer's suit for a refund because such an application of Rule 13(a) would limit government's choice of forum and timing contrary to Congressional intent).

The Fourth Circuit majority opinion found that the "balance [of precedents] tips sharply in favor of the allowability of the counterclaim. . . ." Appendix B at 14a. This characterization of prior judicial decisions is grossly inaccurate. Of the three published decisions cited by the majority, none addresses the present issue: whether the FELA prohibits a counterclaim by a railroad. In fact, in *Capitola v. Minneapolis, St. P. & S. St. M. Ry., supra,* the Minnesota Court stated: "Since the directed verdict [against the railroad's counterclaim] is property sustained . . . it becomes unnecessary to consider whether a counterclaim may be maintained in an F.E.L.A. action." 103 N.W.2d at 870. Yet this is the same case about which the majority opinion stated, "the same right [to counterclaim] was recognized." Neither the Kentucky Supreme Court nor the district court for the Western District of Oklahoma, in the remaining two published opinions, raised or discussed, let alone decided, whether the FELA barred the railroad's counterclaim. *Kentucky & Indiana Terminal R.R. Co. v. Martin,* 437 S.W.2d 944 (Ky. 1969); *Cook v. St. Louis-San Francisco R. Co.,* 75 F.R.D. 619 (W.D. Okla. 1976). Precedent by implication cannot have persuasive force concerning such an important issue.

The remainder of the "weighty" precedent noted by the majority opinion consisted of two unreported one- or two-page orders denying the motion of the employee or his administrator to dismiss the railroad's claim. *Consolidated*

*Rail Corp. v. Anthony J. Dobin, Sr., Administrator,* 81-2539 (E.D.Pa. 1981) (Appendix G) and *Key v. Kentucky & Indiana Terminal R.R. Co.,* C-78-0313-L(A) (W.D.Ky. 1979) (Appendix H). These terse decisions offer little guidance, and, as Judge Hall observed, "[it] is impossible to determine if these unreported opinions represent the judicial mainstream of thought because 'for every [trial court] decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered.' " Appendix B at 19a, citing *Adams Dairy Co. v. National Dairy Products Corp.,* 293 F.Supp. 1135, 1151 n.18 (W.D. Mo. 1968). In the "contest of precedents," as the majority opinion characterized it, Mr. Cavanaugh was at a disadvantage because he lacked the resources of the railroads to gather such unpublished decisions.

In contrast, Mr. Cavanaugh relied upon the holding and rationale of the only appellate court to consider the specific issue of whether the FELA prohibits a railroad's counterclaim for property damage, and the Washington Supreme Court, siting *en banc,* decided that it did. *Stack v. Chicago, M. St. P. & Pac. R.R. Co., supra.* Although Mr. Cavanaugh did present to the Fourth Circuit one unreported district court memorandum opinion, *Shields v. Consolidated Rail Corp., supra,* Judge Constance Baker Motley's opinion sets out her reasoning at length. *See* Appendix F.

Only the Supreme Court can resolve this conflict and provide proper guidelines for the state and federal district courts attempting to implement the FELA, guidelines based upon scholarly and practical analysis.

Compelling reasons exist for this Court to grant Mr. Cavanaugh's petition. The FELA is the sole and exclusive remedy for injured railroad workers, and this Court has

recognized its obligation to effectuate Congressional intent in the FELA "by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow . . . construction." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957). This case does not simply present a sufficiency of evidence question which solely affects the petitioner. The Fourth Circuit's majority opinion has a binding precedential impact on FELA litigation in five states and, as the first court of appeals decision in the federal system, has national implications.

With the current split in decisions, there is no longer nationwide uniformity in the statute's application. This Court has previously granted certiorari when the question raised is "of importance in the uniform administration" of the statute. *Davis v. Virginian R.R. Co.*, 361 U.S. 354, 355 (1960). Railroad workers in the State of Washington and in the Southern District of New York are free to assert their FELA rights in a manner in which other railroad workers cannot. And, of course, railroads in those jurisdictions will forum shop to avoid those court rulings. For example, Consolidated Rail Corporation can maintain a property damage claim against the estate of an employee killed in a railroad accident in the Eastern District of Pennsylvania (*Consolidated Rail Corp. v. Anthony J. Dobin, Sr., Administrator, supra*), but cannot do so in the Southern District of New York (*Shields v. Consolidated Rail Corp., supra*). This untenable situation calls for action by this Court.

Regardless of the result which this Court believes to be correct, Mr. Cavanaugh and all railroad workers deserve better treatment than they received from the majority of the Fourth Circuit panel. The majority's cavalier attitude towards injured employees was evident in its constant be-

littlement of plaintiff's arguments as "far-fetched," "illogical," and "fanciful." Petitioner respectfully requests this Court to grant his petition for a writ of certiorari.

**ISSUE II**

Should this Court grant this petition and affirm the decision of the Fourth Circuit, it should also determine a subsidiary issue: whether an FELA award can ever be offset by an award to a railroad in its damage claim, whether by separate state court action or by counterclaim. Although this issue was not specifically addressed in the courts below, the right to set-off has been asserted by other railroads and will inevitably be employed in this case should the railroads prevail in their counterclaim. *See* Order, *Cook v. St. Louis-San Francisco Ry. Co.*, CIV-75-0791-D (W.D.Okla. 1977) (Appendix I). Since resolution of this issue requires interpretation of the FELA without further development of facts, this Court should reach the issue to avoid further appellate litigation over the FELA in this case.

Congress' intent to compensate injured workers who are contributorily negligent would be nugatory if a railroad could swallow up its employee's award by a set-off or by attachment in a separate proceeding. Nothing could be more clear.

The specific language of Section 55 prohibits a railroad from exempting itself from liability, with the specific exception that a railroad may set off any sum "contributed to or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee." No other set-off is permitted by the statute.

When common-law procedures, such as set-offs, interfere with the statutory intent of Congress, this Court

refuses to apply them. In *Baker v. Gold Seal Liquors,* 417 U.S. 467 (1974), this Court held that where the trustees of a bankrupt railroad in a reorganization proceeding brought suit against a shipper to recover accrued freight charges of Eight Thousand Two Hundred Fifty-Six Dollars and Sixty-One Cents ($8,256.61) and the shipper successfully counterclaimed for property damage to shipments in the amount of Nineteen Thousand Three Hundred Nineteen Dollars and Forty-Two Cents ($19,319.42), the district court erred in setting off one judgment against the other, with a net judgment resulting in favor of the shipper in the amount of Eleven Thousand Seventeen Dollars and One Cent ($11,017.01). This Court found that the set-off procedure would undermine the aim of Section 77 of the Bankruptcy Act to keep the bankrupt railroad operating through reorganization. The trustee's duties to collect all outstanding debts and pay claims against the railroad according to a priority system set by a Reorganization Court could not be carried out if the shipper could completely offset the amount it owed the railroad. *Id.* at 470-472. Therefore, even though the shipper was owed more than it owed, it had to pay the full amount of the judgment against it and most likely received only a fraction of the judgment it received against the railroad.

The analogy to the instant case is appropriate. Congress intended to provide an injured worker with fair compensation for his or her injuries. If the worker's employer can set off its property damage judgment against the worker's judgment or attach the FELA award, the worker is left without a remedy. Surely an injured railroad worker is entitled to as much protection and concern from this Court as a bankrupt railroad!

The Fourth Circuit majority believed that "reason and justice" supported its view. Mr. Cavanaugh would like to bring to this Court's attention one final example of such reason and justice in operation. Edward Eugene Cook brought suit against his employer, St. Louis-San Francisco Railway Company, for injuries as a result of a head-on collision and the railroad counterclaimed for damages. The jury awarded Mr. Cook Forty-Six Thousand Dollars ($46,000) on his FELA claim and awarded the railroad One Million One Hundred Ninety-Seven Thousand Two Hundred Fifty Dollars and Ninety-Eight Cents ($1,197,-250.98) on its counterclaim. The court granted the railroad's motion to set off the claims. Mr. Cook received not one penny and ended up owing his employer One Million One Hundred Fifty One Thousand Two Hundred Fifty Dollars and Ninety-Eight Cents ($1,151,250.98) plus interest. *See* Appendix I. Unfortunately, Mr. Cook did not fare as well in the hands of the judicial system as did Penn-Central Transportation Co. in *Baker v. Gold Seal Liquors, supra.*

Judge Hall said in his dissent, "I cannot believe that Congress intended such an absurd result." What says this Court?

## CONCLUSION

For all of the reasons set forth herein, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and should resolve these issues which are of fundamental importance to the Federal Employers' Liability Act and to railroad workers throughout the nation.

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May 1984

# APPENDIX A

## JUDGMENT
## UNITED STATES COURT OF APPEALS
## FOR THE
## FOURTH CIRCUIT

No. 82-1637

Robert M. Cavanaugh, Appellee,
and
Martha E. Cavanaugh, Plaintiff,

v.

Western Maryland Railroad Company
and
Baltimore and Ohio Railroad Company, Appellants.

Appeal from the United States District Court for the Northern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Northern District of West Virginia and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Northern District of

West Virginia at Elkins for further proceedings consistent with the Opinion of this Court filed herewith.

/s/ William K. Slate, II
CLERK

FILED
February 29, 1984
U.S. Court of Appeals
Fourth Circuit

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 82-1637

Robert M. Cavanaugh, Appellee,
and
Martha E. Cavanaugh, Plaintiff,

v.

Western Maryland Railway Company
and
Baltimore and Ohio Railroad Company, Appellants.

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Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, Chief District Judge. (C/A 81-0034-M)

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Argued: March 11 1983. Decided: February 29, 1984

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Before RUSSELL, HALL and CHAPMAN, Circuit Judges.

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Fred Adkins (Barbara Lee Ayres, Huddleston, Bolen, Beatty, Porter & Copen; Clarence E. Martin, III, Martin & Seibert on brief) for Appellants; Donald R. Wilson (E. Dixon Ericson, Preiser & Wilson on brief) for Appellee.

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Pursuant to Fed. R. Civ. P. 54(b),[1] Western Maryland Railway Company (Western) and Baltimore & Ohio Railroad Company (B & O) appeal from an order of the district court dismissing their counterclaim for property damage in an action brought by Robert M. Cavanaugh (Cavanaugh) under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51 *et seq.* The district court held that the maintenance of the railroads' counterclaim would violate §§5 and 10 of the FELA, 45 U.S.C. §§ 55 and 60, and thus would be contrary to the public policy reflected in such Act. We disagree and reverse.

Cavanaugh was employed by Western or B & O as a railroad engineer.[2] On February 12, 1980, the B & O train on which Cavanaugh was serving as engineer collided head-on with another B & O train proceeding in the opposite direction on tracks owned and controlled by B & O near Orleans Road in Morgan County, West Virginia. On November 19, 1981, Cavanaugh instituted this FELA action to recover one and a half million ($1,500,000) dollars for personal injuries sustained by him as a result of the collision. The railroads answered and counterclaimed under state law for property damage in the amount of one million, seven hundred thousand ($1,700,000) dollars, sustained by them as a result of the same accident. Cava-

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[1](b) permits appeal from a judgment upon one or more but fewer than all of the claims presented in an action "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

[2]Cavanaugh alleged he "was employed by [the railroads], or one of them, as a railroad engineer." In their answer, the railroads admitted this allegation. We leave open the question whether either or both railroads was the "employer" of Cavanaugh within the meaning of the FELA. This question will have to be resolved by the district court in the first instance once all of the facts which may affect the answer to that question have been made a part of the record.

naugh moved to dismiss this counterclaim. The district court granted the motion, determined that there was no just reason for delay, and directed the clerk to enter final judgment on the counterclaim. This appeal followed.

In determining whether the railroads have a right of action which they can assert as a counterclaim in an FELA action begun by a railroad employee, we begin by recognizing that there is a well accepted common law principle that a master or employer has a right of action against his employee for property damages suffered by him "arising out of ordinary acts of negligence committed within the scope of [his] employment" by the offending employee. This was stated as the standard rule by the Court in *Stack v. Chicago, M., St. .P & P. R. Co.*, 94 Wash.2d 155, 615 P.2d 457, 459 (1980), which is the primary authority on which the plaintiff relies. It is also the law as declared generally in the Annotation in 110 A.L.R. 831, and is recognized and applied in *National Grange M. I. Co. v. Wyoming Cty. Ins. Ag., Inc.*, 156 W. Va. 521, 195 S.E.2d 151 (1973), as the law of West Virginia, where the accident occurred. Moreover, this right of action in favor of the employer or master may be asserted either in an independent action by the employer against the offending employee or by a counterclaim filed by the employer in the employee's action to recover for injuries sustained by him in the same occurrence.[3] But, if the employee sues the employer in federal court for injuries sustained in the occurrence the employer has no option; federal practice compels the employer-master to assert by way of a counterclaim his claim against the employee for damages caused by the employee's negligence to his (employer's)

[3]Of course, in either event, the action may be defeated if the master or employer has contributed to his damages by his own negligence. *Kentucky v. Indiana Terminal Railroad Company v. Martin*, 437 S.W.2d 944 (Ky. 1969).

property under penalty of loss of his right of action.[4] *Mesker Bros. Iron Company v. Donata Corporation,* 401 F.2d 275, 279 (4th Cir. 1968), cited with approval in *Baker v. Gold Seal Liquors,* 417 U.S. 467, 469, n. 1 (1974). It follows that if the railroads in this case are denied the right to assert their claim against the plaintiff by way of a counterclaim, they could be denied any right of action ever to recover for the damages to their property suffered as a result exclusively of plaintiff's negligence and the plaintiff in turn could be given absolute immunity from any liability for his negligence both in this action and in any other action begun after judgment in the present action.

It is difficult to believe that such an unfair result is compelled. However, the plaintiff argues that the railroads are foreclosed by the terms of the FELA from asserting their claim against him by way of a counterclaim in his FELA action. The plaintiff does not point to any explicit language in the Act which could be said to require, or even suggest, such a sacrifice of the railroads' rights.[5] Nor does such absence appear to have been inadvertent. Congress demonstrated in other provisions of the Act that it understood well how to prohibit certain defenses and pro-

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[4]This result is a consequence of Rule 13 (a), Fed.R. Civ. P., which defines a compulsory counter-claim under federal practice. Claims which must be aserted by counterclaim are "any claim[s] which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

[5]We express no opinion as to whether barring in an FELA action of such a counterclaim, if coupled with Fed.R.Civ.P. 13(a)'s prohibition of assertion of the claim except by counterclaim, would amount to confiscation and bring into play constitutional considerations.

ceedings by the defending railroads, which it felt might unfairly prejudice the injured employee in the assertion of his right to recover. Thus, it precluded the defense of assumption of risk and substantially modified the defense of contributory negligence. It could as easily, had it intended such result, have barred the defending railroad from asserting by a counterclaim in such action its own claim for damages against the suing plaintiff for damages caused wholly by the negligence of that plaintiff, but it did not choose to do so. The plaintiff is accordingly reduced to contending that the proscription of such a counterclaim by the defending railroads is implicit in the language and the purpose of the Act. He would find the basis for such implication of a prohibition against a counterclaim by the railroads in the language of Sections 5 and 10 of the Act. We, therefore, direct our inquiry to those two Sections. We begin with Section 5.

Section 5 of the Act provides in pertinent part that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ."[6] The plaintiff would find that the maintenance of the present counterclaim under review constituted a device contrived in violation of Section 5 "to deprive plaintiffs [in FELA actions] of their right to an adequate recovery" and "to chill justifiable FELA claims."[7] We do not find the argument persuasive.

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[6]45 U.S.C. § 5.

[7]This statement of plaintiff's position is taken basically from *Stack v. Chicago, M., St.P. & P.R.Co., supra,* 615 P.2d at 459.

Section 5 bars any "device" by the railroad which constitutes a contractual exemption from liability to its employees for personal injuries incurred by them in the course of their duties. Neither by its express language nor by its legislative history does Section 5 suggest in any way that the "device" at which the proscription of the Section was directed was intended to include a counterclaim to recover for the railroad's own losses incurred in connection with the accident out of which the injured employee's claim arose.[8] The plaintiff finds his basis for this argument in what he declares is the necessary implication of the Section to be derived from the use of the statutory term "device." It is no easy feat of linguistics to read a prohibition of a valid counterclaim as within the term "device" in the statute and this is particularly so in that such term is not left dangling in the statute without clarification. The term "device" is defined in the section. It is that "contract, rule, regulation, or device whatsoever, *the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter* (Italics added)." Such statutory definition is clear and, as we have said, it is controlling in determining whether a counterclaim such as the railroads seek to assert in this case is "void[ed]" as a proscribed "device" within the section. The critical word in this definition of "device" is "exemption." It is only when the "contract . . . or device" qualifies as an "exempt[ion] itself from any liability" that it is "void[ed]" under Section 5. But a counterclaim by the railroad for its own damages is plainly not an "exempt[ion] . . . from any liability" and is thus not a "device" within the contemplation of Congress.

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[8]If the statute itself provides any definition of the meaning of the term involved, that definition is controlling. *Conoco, Inc. v. Federal Energy Regulatory Com'n,* 622 F.2d 796, 800 (5th Cir. 1980).

This construction of the statutory definition of "device" is borne out by the legislative history of the section. In House Report No. 1386, 42 Cong. Rec. (1908), pp. 4436, *et seq.*, it is said:

> "This provision [*i.e.*, Section 5] is necessary in order to make effective sections 1 and 2 of the bill. Some of the railroads of the country insist on a contract with their employees discharging the company from liability for personal injuries.
>
> "In any event, the employees of many of the common carriers of the country are today working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees. As an illustration we quote one paragraph from a blank form of application for a situation with the American Express Company, and entitled 'rules governing employment by this company:'
>
> " 'I do further agree in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents, or employees, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out

> of such injury or connected therewith or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators, with the payment to said express company, on demand, of any such which it may be compelled to pay in consequence of any such claim or in defending the same, including all counsel fees and expenses of litigation connected therewith.' "

Obviously, both from the language of the Section itself and from its legislative history, a counterclaim to recover damages in favor of the railroad because of the negligence of the plaintiff is not such a "contract . . . or device" the purpose of which is to provide an exemption which Congress was intending to "void' in Section 5.

The second section from which the plaintiff would deduce a basis for implying a statutory bar against the railroads' counterclaim is section 10 of the Act.[9] Section 10 proscribes any "device" the "purpose, intent, or effect" of which would "prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee. . . ." As the language plainly indicates, this section was intended to prevent the railroad from making inaccessible to an injured employee other railroad employees whose testimony might be helpful to the injured employee if he chose to sue the railroad or, as the Court in *Hendley v. Central of Georgia R. Co.*, 609 F.2d 1146, 1150-51 (5th Cir. 1980), said: "This section prohibits a railroad from disciplining or attempting to discipline an employee for furnishing information to an FELA plaintiff." This purpose of the statute is stated at greater length

[9] 45 U.S.C. § 60.

in *Stark v. Burlington Northern, Inc.*, 538 F. Supp. 1061, 1062 (D.C.Colo. 1982), where the Court Said:

> "The intent of the section was to attempt to equalize the access to information available to the highly efficient claim departments of the railroad and to the individual F.E.L.A. claimants, and to prohibit the promulgation and enforcement of rules which would inhibit the free flow of information to claimants. *See* Senate Report No. 661, 76th Cong., 1st. Sess. 2, 5 (1939). Its authors recognized the danger 'that railroad agents would coerce or intimidate employees to prevent them from testifying.' *Hendley, supra,* at 1150 [609 F.2d] The broad prohibition, 'by threat, intimidation, order, rule, contract, regulation or device,' indicates that § 60 was designed to prevent any direct or indirect chill on the availability of information to any party in interest in an F.E.L.A. claim. Therefore, the Act is to be read liberally."

The plaintiff, however, would find in this section some intention to proscribe a counterclaim by the railroad for damages sustained by it because the maintenance would make other parties privy to the accident reluctant to "participate during the initial investigation by the railroad, at hearings held by the National Transportation Safety Board, or at the trial of an FELA action maintained by a fellow employee" as a result of "the threat of a counterclaim for property damages [held] over the heads of those employees who have the misfortune to be involved in a railroad accident." It would seem that the plaintiff is saying that all railroad employees who have any

knowledge of an accident must be given immunity from liability lest they be prevented "from voluntarily furnishing information" in support of plaintiff's action by the threatened possibility that they too would be sued by the railroad for their responsibility in connection with the accident. We cannot believe that Congress had any such farfetched purpose in enacting section 10.

The plaintiff, however, finds lurking obscurely in the language of Sections 5 and 10 a legislative purpose to interdict counterclaims by defending railroads in FELA suits because the filing of such counterclaims will unfairly coerce or intimidiate the injured employee from filing and pursuing his FELA action. As we have already observed, there is nothing in the language of the Act or its legislative history that supports this reasoning. More than that, there is no authority for an assumption that the possibility of a counterclaim being filed creates an unfair advantage in favor of the defendant or improperly coerces or intimidates the injured party from seeking redress for his injuries. Certainly Congress, in the course of enacting FELA never expressed any interest in denying to the defendant railroad the right of counterclaim because of any assumed prejudice thereby caused to the plaintiff in an FELA action and we do not think we should try almost eighty years after the FELA was originally enacted to read a prohibition of a counterclaim by the defending railroad into sections 5 or 10 on some fanciful notion that the maintenance of the counterclaim will prevent or prejudice the injured railroad employee in securing a fair award at the hands of the jury. The same argument could be advanced against the admissibility of a counterclaim in any tort action.

We would pose this hypothetical situation: The ruling of the district court would not prevent the railroads in this case from filing an independent action against the

plaintiff-employee herein as a defendant to recover damages to its property as a result of his negligence. Assuming that the railroads can maintain such action, is the plaintiff-employee required under Rule 13(a), to assert his FELA claim as a counterclaim? If he is, we have substantially the same situation as we would have if the right of the railroads to counterclaim in the plaintiff's FELA action is recognized. If, however, the plaintiff-employee is not required to assert his FELA claim as a counterclaim in the railroads' independent action, will the plaintiff be barred by Rule 13(a) from asserting such claim in an action under FELA against the railroads after judgement in the railroads' independent action? We do not seek to answer these questions but post them simply to emphasize the illogic of the ruling denying the railroads the right to counterclaim in the FELA action for their damages to their property resulting from the accident.

We recognize that the plaintiff finds support for his contrary conclusions in *Stack v. Chicago, M.St.P. & P.R.Co., supra,* 615 P.2d 457. In fact the reasoning of *Stack* is the basis for plaintiff's argument in this Court. We are not persuaded by such reasoning. So far as we have found, *Stack* has only been approved in one unreported district court case, *Shields v. Consolidated Rail Corporation,* No 81 Civ. 4204 (S.D.N.Y., Dec., 1981). On its facts, though this latter case could probably be distinguished from this case but we accept it as contrary to our view. However, there are at least two unreported district court opinions in which the same view as expressed by us was adopted, *Consolidated Rail Corp. v. Dobin, Adm'r.,* Case No. 82-2539 (E.D.Pa. 1981); *Key v. Kentucky & Indiana Terminal R. Co.,* Case No. C-78-0313-L(A) (W.D.Ky. 1979); and one reported case, *Cook v. St. Louis-San Francisco R. Co.,* 75 F.R.D. 619 (W.D.Okla. 1976), in which

the opinion, though dealing directly with another issue, showed that the court in that case had ruled that the railroad could maintain a counterclaim in an FELA case filed by an injured railroad worker; and in *Kentucky & Indiana Terminal Railroad Company v. Martin,* 437 S.W. 2d 944 (Ky. 1969), and *Capitola v. Minneapolis, St.P. & S.M.R.Co.,* 103 N.W.2d 867 (Minn. 1960), the same right was recognized. In the contest of precedents, it would appear that the balance tilts sharply in favor of the allowability of the counterclaim herein. More important for us, though, reason and justice support that view.

Finding nothing in either section 5 or section 10 of the FELA from which it can be reasonably implied that Congress intended the illogical result of proscribing the filing of a counterclaim by the railroads in an FELA case to recover for property damages sustained by reason of the sole negligence of the plaintiff-employee in that action, we reverse the ruling of the district court dismissing the defendant-railroads' counterclaim and remand the cause for further proceedings not inconsistent with this decision. In remanding, however, we direct that, the district court shall, on remand, order the FELA case and the counterclaim be tried separately. This has been the manner in which similar cases seem to have been handled. *See Cook v. St. Louis-San Francisco R.Co., supra.*

REVERSED
and
REMANDED

Hall, Circuit Judge, dissenting:

I disagree with the majority's conclusion that the maintenance of the railroads' counterclaim does not violate the Federal Employers' Liability Act (the "FELA"), 45 U.S.C. § 51 *et seq.* Nor can I agree with the majority's failure to hold that the counterclaim is contrary to the public policy reflected in the FELA. I therefore dissent.

Contrary to the majority's assertion, the language of the FELA supports the conclusion that Congress intended to prohibit counterclaims, such as the one filed by the railroad here,[1] because the filing of such counterclaims will unfairly coerce or intimidate the injured employee from filing and pursuing his FELA action. Specifically, section 5 of the FELA provides in part that: "Any contract, rule,

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[1] At oral argument before the district court, counsel for the railroads acknowledged that railroads generally do not bring actions against their employees for property damage because they have no reasonable expectation of recovery and because their employees may in fact be judgment proof. In this case, the railroads did not assert their claim for property damage until approximately one year and nine months after the accident when Cavanaugh instituted his FELA action. In fact, counsel for the railroads admitted to the district court that:

> In this case, [Cavanaugh] is not going to be judgment proof when he recovers a vast sum of money, which he is attempting to recover from the Railroads.
>
> As a matter of fact, he is going to be a rich man once he recovers, and can establish a right to recovery. And that is why this [counterclaim] has been asserted
>
> . . . .

Tr. 78. Thus, it is clear to me that the railroads filed their counterclaim either to coerce Cavanaugh into settling his claim or, if his FELA action proceeded to trial, to strip him of any damages by means of an offset. I cannot agree that Congress intended to sanction such a motive.

regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C. §§55. Section 10 of the FELA further provides in pertinent part that: "Any contract, rule, regulation, or device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, . . ." 45 U.S.C. §60. In my view, the majority construes these statutes too narrowly.

The Supreme Court of Washington considered these statutes in *Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 94 Wash. 2d 155, 615 P.2d 457 (1980) (en banc). In *Stack,* a brakeman injured in a head-on collision of two trains and the widow of an engineer killed in the same collision brought actions against the railroad under the FELA. The railroad counterclaimed against the engineer and filed a third-party claim against the remaining crew members seeking 1.5 million dollars in property damage resulting from the collision. The Supreme Court of Washington held unanimously that the railroad's counterclaim and third-party claim "constituted 'devices contrived to deprive plaintiffs of their right to an adequate recovery and operated to chill justifiable FELA claims in violation of 45 U.S.C. 55 and 60." 94 Wash. 2d at _____, 615 P.2d at 459. I agree.

The single overriding purpose of the FELA is to provide compensation for injured railroad workers. It accomplishes this purpose by imposing liability upon railroads for injuries to their employees resulting from the railroads' negligence. 45 U.S.C. §51. As explained by the Supreme

Court in *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326 (1958), the FELA

> was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. The cost of human injury, an inescapable expense of railroading, must be born by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier.

*Id.* at 329 (citations omitted). The FELA departs from the common law, *id.,* and supplants state laws with a nationwide uniform system of liberal remedial rules. *South Buffalo Ry. Co. v. Ahern,* 344 U.S. 367, 371 (1953). It provides injured railroad workers with their exclusive remedy against their employers for injuries resulting from their employers' negligence. *New York Central Railroad Company v. Winfield,* 244 U.S. 147, 151-52 (1917). Section 5 of the FELA, 45 U.S.C. §55, voids releases or "[a]ny . . . other device[s] whatsoever" which enable railroads to exempt themselves from liability for their employees' injuries under the FELA.[2] *Stack* 94 Wash. 2d at _____, 615 P.2d at 461, quoting *Kozar v. Chesapeake & Ohio Ry., 320 F.*

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[2]The majority acknowledges that a contract of employment releasing the railroad from liability for personal injuries is void under § 5 but reasons that "a counterclaim by the railroad for its own damages is plainly not an 'exempt[ion] . . . from any liability' and is thus not a 'device' within the contemplation of Congress." I cannot agree.

The effect of a release or a counterclaim on an injured railroad employee is the same. In both cases, he will be denied compensation fore his injuries caused by the railroad's negligence and in the final analysis, the railroad will be exempt from liability. It is this intolerable result which Congress intended to prevent by enacting § 5.

*Supp. 335, 383-85 (W.D. Mich. 1970), vacated in part on other grounds,* 449 F.2d 1238 (3d Cir. 1971)).

In my view, the railroads' counterclaim is a "device" calculated to intimidate and exert economic pressure upon Cavanaugh, to curtail and chill his rights, and ultimately to exempt the railroads from liability under the FELA. Here, as in *Stack,* the railroads' counterclaim violates 45 U.S.C. § 55 "because the ultimate threat of 'retaliatory' legal action would have the affect of limiting [the railroads'] liability by discouraging employees from filing FELA actions. Further, it would have the effect of reducing an employee's FELA recovery by the amount of property damage negligently caused by the employee." 94 Wash. 2d at _____, 615 P.2d at 460. To allow the railroads' counterclaim to proceed would pervert the letter and spirit of the FELA and would destroy the FELA as a viable remedy for injured railroad workers. The result sought by the railroads, and accepted by the majority, defies common sense and is repugnant to the general goal of the FELA to compensate railroad workers for injuries negligently inflicted by their employers.

In addition, the railroads' counterclaim contravenes 45 U.S.C. § 60 in that it would prevent employees from voluntarily furnishing information regarding the extent of their negligence. *Stack*, 94 Wash. 2d at ____, 615 P.2d at 460. The FELA "is intended to stimulate [railroads] to greater diligence for the safety of their employees and of the persons and property of their patrons." *Jamison v. Encarnacion,* 281 U.S. 635, 640 (1929). As long as a railroad is permitted to hold the threat of a counterclaim for property damage over the heads of those employees who have the misfortune to be involved in a railroad accident, those witnesses, whether injured or not, may well be reluctant to

participate during the initial investigation by the railroad, at hearings held by the National Transportation Safety Board, or at the trial of an FELA action maintained by a fellow employee.

Nor can I agree with the majority that "[i]n the contest of precedents . . . the balance tilts sharply in favor of the allowability of the counterclaim herein." The majority's reliance on *Kentucky & Indiana Terminal Railroad Company v. Martin,* 437 S.W.2d 944 (Ky. 1969), and *Capitola v. Minneapolis, St. P. & S.M.R. Co.,* 258 Min. 206, 103 N.W.2d 867 (1960), is misplaced. In *Martin,* the issue of whether a counterclaim could be maintained in an FELA action was neither argued by the parties nor considered by the court. The dismissal of the counterclaim was upheld on the ground that the railroad's negligence foreclosed its recovery on the counterclaim. *Martin,* 437 S.W.2d at 951. In *Capitola* it was "unnecesary to consider whether a counterclaim may be maintained in an F.E.L.A. action." *Capitola,* 103 N.W.2d at 870.

The majority also relies on two unreported district court opinions, *Consolidated Rail Corp. v. Dobin, Adm'r,* No. 82-2539 (E.D. Pa. 1981), and *Key v. Kentucky & Indiana Terminal R. Co.,* No. C-78-0313-L(A) (W.D. Ky. 1979). In this Circuit, citation of unpublished decisions is disfavored. *See* 4th Cir. Local Rule 18(d). It is impossible to determine if these unreported opinions represent the judicial mainstream of thought because "for every [trial court] decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered." *Adams Dairy Company v. National Dairy Products Corp.,* 293 F. Supp. 1135, 1151 n. 18 (W.D. Mo. 1968). Moreover, in *Key,* without setting forth any reasoning, the district court summarily denied the employee's motion to dismiss the railroad's counterclaim or to sever the trial of the

counterclaim from the trial of the complaint. Such a cryptic order in a case that was ultimately dismissed as settled can provide no guidance for the present appeal.

Finally, *Cook v. St. Louis-San Francisco R. Co.*, No. Civ. 75-0791-D (W.D. Okla. Aug. 3, 1977), cited by the majority, forcefully illustrates the unjustness of the majority's decision. In Cook, the plaintiff was a fifty-four year old conductor who earned $18,000 when he was seriously injured as a result of a freight train collision. The jury returned a verdict of $46,000 on the plaintiff's FELA complaint and a verdict of $1,197,250.98 on the railroad's counterclaim. Thus, the plaintiff was left with no compensation for his injuries and a judgment debt of more than 1.1 million dollars. I cannot believe that Congress intended such an absurd result.

For the foregoing reasons, I would affirm the judgment of the district court.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA



ROBERT M. CAVANAUGH and
MARTHA E. CAVANAUGH,

*Plaintiffs,*

v. CIVIL ACTION NO. 81-00340M

WESTERN MARYLAND RAILWAY COMPANY and BALTIMORE AND OHIO RAILROAD COMPANY,

*Defendants.*

FINAL JUDGMENT ORDER

The Court, having earlier rendered a decision in this action, limited to Defendants' Counterclaim, it is

ADJUDGED and ORDERED that:

1) Plaintiffs' Motion to Dismiss, directed to the Counterclaim of Defendants', is hereby GRANTED.

2) There is no just reason for delay of entry of final judgment upon said Order, and entry of final judgment is therefore directed. Rule 54(b) F.R.C.P.

APPROVED: June ____, 1982.

United States District Judge

Dated at Elkins, West Virginia, this 16th day of June, 1982.

/s/Thomas F. Stafford
Clerk of Court

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ROBERT M. CAVANAUGH and
MARTHA E. CAVANAUGH,
*Plaintiffs,*



v.

CIVIL ACTION NO. 81-00340M
WESTERN MARYLAND RAILWAY COMPANY and BALTIMORE AND OHIO RAILROAD COMPANY,
*Defendants.*

### ORDER

On March 24, 1982 came the Plaintiffs, Robert M. Cavanaugh and Martha E. Cavanaugh, by their attorneys, Donald R. Wilson and E. Dixon Ericson, and came also the defendant, Western Maryland Railway Company, by its attorney, Clarence E. Martin, III, and the defendant, Baltimore and Ohio Railroad Company, by its attorney, Barbara L. Ayers, at a telephone conference call hearing initiated by the Court and engaged in without objection by all counsel, upon Plaintiff's Motion to Dismiss, directed to the Counterclaim of the Defendants. A transcript of the hearing and the Court's ruling on this matter has been prepared and is now a part of the record of this action.

Upon consideration of the motion of the Plaintiffs, and the briefs submitted to the Court by attorneys for the Plaintiffs and by attorneys for the Defendants and the oral argument of attorneys for the Plaintiffs and for the Defendants on the matter at issue. The Court is of the opinion

that Plaintiffs' Motion for Judgment on the Pleadings be, and at the same is hereby, DENIED.

The Court is further of the opinion that the issue presented by the alternative motion of the Plaintiffs' is whether the Defendant railroads, sued by an employee, in a FELA action, may assert a counterclaim for property damages.

As is more fully set forth in the record, the Court is of opinion that the Federal Employer's Liability Act, 45 U.S.C. §§ 51, et seq. was intended by Congress to be the exclusive remedy for injured railroad workers. Examining the Act in its entirety, a counterclaim against the injured employee would seemingly violate § 55 of the Act, which prohibits the employment of any device, the purpose of which would be to enable the railroad to exempt itself from the laibility created by the Act, and thus would be contrary to public policy. Accordingly, it is

ORDERED that Plaintiffs' Motion to Dismiss the counterclaim of Defendants be, and the same is hereby, GRANTED, to which ruling the Defendants object and request that their exception be noted.

Further, at the request of Defendants, the Court hereby determines that there is no just reason for delay of entry of final judgment on this Order, and it is

ORDERED that the Clerk of this Court enter a final judgment upon this Order dismissing the Counterclaim of the Defendants, pursuant to Rule 54(b), F.R.C.P.

ENTER: June 16th, 1982.

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

| | | |
|---|---|---|
| ROBERT M. CAVANAUGH and MARTHA E. CAVANAUGH, *Plaintiffs* | ) | |
| v. | ) | CIVIL ACTION NO. 81-34-M |
| WESTERN MARYLAND RAILWAY COMPANY and BALTIMORE & OHIO RAILROAD COMPANY, *Defendants* | ) | |

March 24, 1982
Elkins, WV

* * * * * * *

BEFORE: The Honorable Robert E. Maxwell, Judge.

APPEARANCES:

For the Plaintiffs: Dixon Ericson, Esq.
Donald R. Wilson, Esq.
Charleston, WV

For the Defendants: Barbara Ayers, Esq.
Clarence E. Martin, Jr.
Martinsburg, WV

* * * * * * *

Whereupon, on the 24th day of March, 1982, the above-styled matter was transacted on a telephone conference

call and the following is a transcript of said proceedings, to-wit:

PROCEEDINGS

THE COURT: Good morning. Now, let's see, we have Mr. Ericson and Mr. Wilson for the Plaintiff?

MR. WILSON: Yes, your Honor.

THE COURT: And we have Mrs. Ayres and Mr. Martin for the Defendants?

MRS. AYRES: Yes, your Honor.

MR. MARTIN: Yes, sir.

THE COURT: We have our Court Reporter present, who will make a record for us. And Mrs. Stemple is here to make her notes. So while you are in your respective offices, this has the same force and effect, we hope, as being in the courtroom somewhere, with less expense and inconvenience. And perhaps we can reach the same result.

MR. WILSON: I think it is a great idea, Judge.

THE COURT: Well, it saves you a little money and time and I know that all of you are very busy lawyers and have busy schedules. So, we want to do this for you.

This case, for the Court Record, is Cavanaugh v. Western Maryland Railway and it is Civil Action No. 81-34-M.

And in particular we have a Motion that has been filed, and it is a Motion for Judgment on the Pleadings, or in the alternative, a Motion to Dismiss as filed by the Plaintiff and goes to the counterclaim of the Defense.

I appreciate the efforts that each side has given to this matter. And I appreciate the opportunity to consider the issue further.

Would counsel for the Plaintiffs, either of you, care to say anything further and in addition in support of your motion?

MR. WILSON: Let me speak to that first.

THE COURT: All right, sir.

MR. WILSON: I think that our brief sets forth our contentions clearly as we can set them forth.

The fact of the matter is that it seems to us that to permit a counterclaim against a railroad employee would have the obvious effect of completely chilling the employee's only hope of recovery against an employer for the obvious reason that if the employee is always threatened with a suit for property damage in an institution that has property of the size and value of the railroad, he cannot afford to run the risk of subjecting himself to a counterclaim for sums which in many, many instances would be substantially in excess of the amount that he could claim or prove, although seriously injured.

Secondly, it appears to us that there is no West Virginia authority that we have been able to locate that permits a suit by an employer against an employee. The rationale of the public policy and the chilling effect is we think, set forth in the Stack case, which we have discussed in our brief.

The absence of authority permitting a counterclaim at common law, we think, is supported by the inability, as far as we know, of counsel for either the Plaintiff or the Defendant Railroads, to come up with any clear West Virginia authority showing that there can be a suit by an employer against an employee, even at common law.

Thirdly, we believe that to permit a counterclaim to be

asserted, aside from the general chilling effect, would impose a double liability upon an employee.

For example, under F.E.L.A. there is a pure comparative negligence rule of law. Now, that means that if the employee is 60 percent negligent, his award is then reduced by 60 percent.

Under the comparative negligence law of the State of West Virginia, that 60 percent would bar his recovery, but would have the effect of reducing the Railroad's recovery by only 40 percent.

So, the Railroads get the benefits in two ways and under two different theories of law in the same lawsuit.

Finally, I think that we must urge upon the Court that this is in effect, a scurrilous claim. The fact of the matter is that the Railroads well know that Mr. Cavanaugh could not respond to damages to the extent that the Railroads have claimed damages, assuming that it could prove them.

Furthermore, the Railroads in this case have failed to sue each other. So obviously, they are not looking for a money return. They are only looking to discourage this lawsuit by an employee against the railroad.

Now, I realize that I have very largely recapitulated what we have said in our initial brief and in our reply brief. I have expanded perhaps, only on the concept of the application of comparative negligence and the absence of serious intent on the part of the Railroads to make an actual money recovery.

But I think, Judge, that I have outlined our positions with reference to the matter that we think are critical to a decision in this case.

THE COURT: All right, sir. Thank you very much. We appreciate your reflections on the matters you have submitted.

Mrs. Ayres or Mr. Martin, would either of you like to speak on this matter?

MRS. AYRES: Your Honor, I have some responses that I would like to make to some of the things that Mr. Wilson has set forth.

He has represented to the Court that there is no West Virginia authority indicating a common law cause of action.

We have cited to the Court a West Virginia case which is in the principal-agent context. And in their reply brief, the Plaintiff has attempted to distinguigh the principal-agent context from that of master-servant. But we believe that is a distinction without a difference.

Many of the cases from other jurisdictions setting forth the cause of action and holding that there is a cause of action in these situations, even phrase, the language that there is such a cause of action by an employer — against his negligent employee, or by a principal against his negligent agent, or by a master against his negligent servant.

I think that the labels that are placed on the roles of the parties in these situations are really not a matter which is substantive as to the cause of action.

The cause of action arises out of the basic fault concept of tort law, that is, that someone either negligently or intentionally harms someone else, either personal injury or property damage, and they are obligated then under the law to respond by paying damages for those injuries.

I see nothing in the master-servant relationship, or the principal-agent relationship, or the employer-employee relationship, no matter what you call it. Which justifies a court in abrogating that very well established common law principle, and I think that the West Virginia Supreme Court recognized that principle in the National Grange case, which I have cited in my brief.

As to Mr. Wilson's argument that to permit this cause of action would impose a double liability on the employee because of the comparative negligence provisions of the Federal Employers Liability Act and the comparative negligence provisions of the West Virginia law. I think that there is some confusion going on there.

The comparative negligence provisions under F.E.L.A. requires that the damages for the Plaintiff's personal injuries be reduced proportionally if he is negligent. And if his own negligence proximately contributed to his injuries.

The comparative negligence provisions of West Virginia law as to our counterclaim will apply to reduce the damage recovery on the Railroads property damage.

This case involves two entirely separate claims – kinds of claims; one for personal injuries and one for property damages and based on two different bodies of law, the Federal Employers Liability Act and West Virginia Common Law.

They are only joined in this single lawsuit because of the requirements under the West Virginia Rules of Civil Procedure and the Federal Rules of Civil Procedure that such a claim because it arises out of the same circumstance or occurence is a compulsory counterclaim. In fact, the Railroad could have brought this suit separate and apart from any other action if they had filed first, and then the

F.E.L.A. claim would have been a compulsory counterclaim.

The argument that Mr. Wilson has advanced that this counterclaim will chill the employees hope of recovery, and will across the board affect F.E.L.A. claims by multiple claimants, I don't think is a realistic assessment. For I don't think this is going to happen very often. And I think that historically, the lack of case law on this point indicates that employers do not do this very often. And railroads do not bring these kinds of counterclaims very often. Partially and probably because of the point that Mr. Wilson made that most of their employees would not have the kind of resources and may in fact be judgment proof, when you are talking about this large of a property claim.

In this case, this man is not going to be judgment proof when he recovers a vast sum of money, which he is attempting to recover from the Railroads.

As a matter of fact, he is going to be a rich man once he recovers, if he recovers, and can establish a right to recovery. And that is why this has been asserted in this claim.

I do not think that it is accurate to reflect it as – as scurrilous. What we have here is a man who by his own negligence, caused terrible injuries to other people and to other employees, by falling asleep at the switch and violating all of the rules that are imposed by his employer. All of the safety principles that are supposed to operate in that situation. He in fact - in fact, this resulted in the death of another employee – of an employee of another railroad.

The reasons that the Railroads have not sued each other

in this situation, I don't think, are particularly applicable or pertinent to this question. But I think that it is fairly obvious that negligence apparently was all on the part of Mr. Cavanaugh.

I don't see any cause of action by the B&O against the Western Maryland, as a matter of fact. And therefore, would see no conflict in the positions of the Railroads and no reason why they should attempt to assert any right to recovery against each other.

There are some other points that I think also need to be brought out in addition to my responses to Mr. Wilson's comments.

This is a situation that is analagous to a Motion for Summary Judgment. And I think that there are still very many factual questions that are disputes of fact, that need to be resolved.

I don't think it is appropriate for the Court to act on this Motion to Dismiss at this time. I don't think that sufficient discovery has been done or sufficient information is before the Court, for the Court to take this kind of action at this point in the lawsuit.

I do not feel that this claim is contrary to public policy, which they ahve argued, for the very reasons I have set forth in my brief and we have argued before. This has been considered by the various courts, including the Court in the Fireman's Fund case, this argument about public policy. Which seems to essentially break down to the idea that employees should always have rights of action against their employers, but that it should not work both ways.

And I don't think that as a matter of public policy that this Court or any other Court, should hold that employees

may inflict damages, either personal injuries, or property damages, upon his employer with immunity; with no liability in him for that kind of negligent or intentional tort.

I think that would be a very bad policy for any of the Courts to adopt.

With regard to the argument made by Mr. Ericson's brief on the unpublished decisions that we have cited. I have checked and there is no rule about the use of unpublished decisions either in the Rules of Civil Procedure or in the local rules of this Court.

However, there is a rule that is on point in the Local Rules of the Fourth Circuit Court of Appeals, Rule 18 does permit the citation of unpublished decisions where that decision has precedential value in relation to material issues. And where there is no published opinion which serves as well and where counsel serves everyone with copies of the unpublished opinion.

I think all of those things apply in this matter. There is not every much precedent available in the published decisions to guide this Court. And we would like to cite these unpublished opinions to this Court, to give you some guidance and to have some means of knowing where the judicial thoughts in this country is going on this point.

I think that the fact that the Stack case ultimately ended up in the books is purely fortuitous. These other cases did not happen to end up in the books. And I don't think that, that necessarily means that the Stack case should have precedential weight far out of proportion.

And, of course, the Court is well aware that a Washington State Court decision is not binding upon this Court. And this Court is entitled and even obligated to

decide this case for itself, based upon its own research and opinion.

We also have within the last few days found a fourth unpublished decision. I have not provided copies to anyone yet, because we have not yet received a certified copy from the court. And we will do so immediately when we do receive the copy of the ruling.

The case is Consolidated Rail Corporation v. Anthony J. Dobin, Administrator of the Estate of Anthony J. Dobin, II, deceased. It was decided by the United States District Court for the Eastern District of Pennsylvania. It is again, a counterclaim case. And a Federal Employers Liability Act case. And the Court there held, and I will read to you from the order.

> "There is a common law right of action by a master against its servant for property damage arising out of ordinary acts of negligence committed within the scope of employment.
>
> The Federal Employers Liability Act sets forth the grounds under which a railroad employee may recover from his employer for personal injury incurred while working.
>
> The provisions of the F.E.L.A. do not abrogate the railroad's common law right against its employees for property damage caused by their negligence.
>
> I decline to adopt the reasoning of Stack—" And the Stack case is cited here — "That a suit by a railroad against its employee for property damage is a device whatsoever, either designed to relieve the railroad of liability, or to prevent other employees

from furnishing voluntary information regarding the facts incident to the injury or death of the defendant."

This case is the court's ruling on a Motion for Summary Judgment in a case which has not — is still pending in the Eastern District of Pennsylvania. The little summary of the case, and the quotation that I gave you, appeared in a railroad lawyer's publication and we just ran across it. I have requested a certified copy of that order which contains the language that I read to you and will be forwarding a copy of that to counsel for the Plaintiff, and to the Court, as soon as we receive it.

I apologize for not having had that available, but I simply could not get that in time.

With regard to the arguments that Section 60 of the Federal Employers Liability Act applies to this case. I think that it is clear that nobody's testimony is going to be chilled. There is nobody's liability involved here except that of the Railroads and that of Mr. Cavanaugh. So, I do not think that Section 60 of the F.E.L.A. applies here.

As to Section 55. I think that the legislative history of the state statute which we cited in our brief makes it very clear that this is not the kind of thing that was contemplated by the statute.

The Congress was concerned when they passed these statutory sections with correcting specific abuses that had gone on in the railroad industry prior to that Act. Things involving releases and employment contracts which deprived the employees of their rights under the Federal Employers Liability Act.

This case, and this counterclaim, does not involve any

such device or a desire by the Railroads to chill anybody's rights under the F.E.L.A. This is a common law right of action. It is clear that the Railroads has, and always has had, under the common law. And I think we have every right to assert it and if we can prove it – and we think we can – then we are entitled to recover damages, or at least an offset of the damages recovered in the F.E.L.A. action against Mr. Cavanaugh.

That is essentially all of the points that I wanted to make. Mr. Martin may have some other points to make in response.

THE COURT: Mr. Martin?

MR. MARTIN: Judge, I think that Barbara has covered it pretty well.

I just want to call your attention to one thing. If you throw this case out, under the counterclaim, that means, of course, that the employee can vandalize the employer's property and get away with it; particularly on a railroad.

I don't think that is the law of any state or is it the public policy in West Virginia or any place else.

That's all I care to add to it. She's covered it very well.

THE COURT: All right, sir. Mr. Wilson?

MR. WILSON: Well, with reference to the point that Mr. Martin made.

I don't believe that the effect of the Court's ruling that the counterclaim cannot be maintained would be that it would permit an employee to vandalize property. We are talking about an intentional tort as opposed to a negligence matter.

I think that there has been a consistent assertion, and this is a well recognized principle of common law. And I do not think that can be supported in West Virginia. It may very well be supported in other jurisdictions, but the fact of the matter is we have no employer-employee case in West Virginia.

We do have the agency case, the National Grange case. Which Mrs. Ayres has referred to. That was a case of an insurance agent deliberately or grossly and negligently violating instructions that were given to him by his principal. And exposed his principal to liability to a third party under circumstances, which had the instructions been followed, would not have resulted in exposure of the principal to the third party.

That is not an employer-employee case. It is a principal-agent case. A principal-agency relationship is governed by the contractual relationship between them. And it is completely different from an employer-employee relationship.

The overwhelming fact is that the Railroad has not been able to point to a single case in West Virginia, which an employer has been permitted to sue an employee for negligently inflicting damage to its property. And they are asking this Court to really announce that there is a common law in West Virginia which they, and we, have not been able to confirm in anyway.

Now, with reference to the unpublished decisions. I think that it is well accepted that unpublished decisions are not favored.

The Railroad apparently has some kind of a publication which is available to Mrs. Ayres, in which various unpublished opinions, or decisions, are revealed. That may very well be comfortable for Mrs. Ayres. However, we do not have such resources.

We have no way of exploring over the nation the various unpublished decisions that are favorable to our position, or unfavorable to our position. And to ask a Court to accept these unpublished decisions as some kind of authority, I think is an intrusion really upon the integrity of fundamental research.

And it is not just the Stack case that we say is support of our position. It is the reasoning of the Stack case that we say supports our position. And that is something that can be left to your Honor's own analysis.

We find that the reasoning of that case is quite cogent. We find tht the opinion as written lays bare the basically chilling nature of the very kind of thing that the Railroads here are trying to do in this case.

Now, Mrs. Ayres says that it is not true that Mr. Cavanaugh will be unable to respond in damages because if he prevails in this case, he is indeed, going to be an extremely wealthy man. And that the railroad then, having paid him the money, will then be able to get it back to satisfy its property damage.

So, it seems to me that there is some fundamental pretzel like behavior that is there. They say that if he wins his case, he will have the money and we will give it to him and we will take it back in terms of property damage. We cannot say that we are in anyway receiving him properly, because we are making certain that he is going to get the money and then we will get it back. Now, that just doesn't wash. It doesn't make any sense.

It is also the suggestion that you don't need to sue the employer. Well, realize that there is no absolute obligation to sue the employer, but if the employer is in effect, trying to get the money, they had better go for somebody that

has the pockets that contains the money, and not from a man who has spent his entire life working as an engineer and has accumulated very little.

The only real source of return that they are seeking, the best that they can come up with, is that it will be a return that they will provide, if he wins this case. And they say that there is no chance of Section 60 of F.E.L.A. being in operation here because no one's testimony is going to be chilled, in view of the fact that they have sued only one man. They have not sued the other employees.

Now, that misses the point. The point is that any of these other employees might very well have been sued. Mr. Cavanaugh certainly has been sued. I supposed that if you extend this to its logical conclusion, that what the Railroad could have done under Mrs. Ayres theory of common law rights in West Virginia, is to sue every employee of the two trains that were involved in this collision. And sure, some employee would have been found responsible.

Now, the fact of the matter is that F.E.L.A. is the only remedy that a railroad employee has. He has no workmens compensation. He has no other remedy except F.E.L.A. And if everytime he brings an F.E.L.A. action, he has to be faced with the prospects of a substantial suit against him by the railroad, he simply could not afford to undertake the risks.

Mrs. Ayres says, well, this is something that is not done very frequently. And therefore, I am chasing ghosts when I suggest that this may have a very chilling effect.

The fact of the matter is that it is being done apparently according to her own research, far more frequently than it was in years gone by. I don't find any of these unpublished decisions going back into the many, many years that we

have had F.E.L.A.; they are all of comparatively recent vintage.

It seems to me that evidences that the Railroads believe they are now on to something that may very well be troublesome.

The one case that I recall in which the employee got a $46,000.00 judgment and the railroad got something over a million dollars. And one judgment was set-off against the other and the effect of that was, one; the employee got nothing and secondly; the railroad itself, didn't get compensated. They didn't intend to get compensated apparently, because there was nothing there to pay it with.

Now, it seems to me your Honor, that the arguments with reference to the compulsory nature of the counterclaim miss their mark. The counterclaim would not be compulsory in this litigation had the Railroads elected to sue each other, based on the nelgigence of various employees.

Mrs. Ayres goes into what she conceives to be some of the facts of this case fairly extensively. And speaks of this man being asleep and being the sole cause of the accident. And I don't know that the evidence will support that.

But that is not the point at this stage of the proceedings. This stage of the proceedings is purely a question of law for the Court.

This is not in the nature, at this stage, of a Motion for Summary Judgment, except insofar as the fact that it is our contention that there is no entitlement under F.E.L.A. or common law, which will permit the Railroads to maintain this action. And it seems to me that that is a pure question of law for this Court to resolve at this time on the Pleadings.

We are not dealing with a Motion for Summary Judgment based on the contention that there are no facts that are in dispute. We are simply saying that the counterclaim that has been asserted is not authorized at law.

The argument of the Railroad with reference to the chilling effect this may have strikes me as being particularly preposterous. I don't see how anyone can contend that an employee who is faced with a suit will go right ahead and try to maintain the F.E.L.A. action in good spirit and with great courage and confidence.

The Railroads know that this will have a chilling effect on F.E.L.A. They know that it will increase their bargaining power when they undertake in any case, to settle the case early. There is in fact, if the Court permits this kind of a counterclaim to be asserted, an actual threat that is made by the Railroad to the employee. That if you assert these rights, then you will be subjected to a suit that will at least break you, if we win.

Now, the comparative negligence confusion that Mrs. Ayres refers to is exactly what I was talking about there.

Under F.E.L.A., an employee, if negligent, the amount of that negligence is taken into consideration in reducing the size of the award that is ultimately made to him. That's its only effect.

In the comparative negligence law of West Virginia, if the employee is 51 percent negligent, he becomes liable for the entire amount. That is all that is required. If the railroad is only 49 percent negligent that does not defeat its claim.

So it seems to me that we ae asking for a great deal of confusion if we ever get to the point where we are trying to

try two different comparative negligence concepts. But that really is not involved in this motion.

We can speculate about that. And we can try to envision what would happen at a trial, but that is not in issue at this time. What is in issue is whether the Railroad has, in West Virginia, this right to assert this counterclaim.

And I emphasize to the Court once again, that there is no such common law right in West Virginia. The only case that is relied upon by the defense does not involve an employer-employee. An insurance agent was not an employee of its principal. So there is no such common law right that we have been able to find in West Virginia. And apparently there is no such common law right that Mrs. Ayers has been able to find, either, in West Virginia.

And finally, I would emphasize again and again, that if this Court permits a counterclaim such as this to be filed, it will lay the framework for the complete destruction of F.E.L.A. action in the State of West Virginia. Because the employees will not be willing to incur this risk in personal injury cases.

And I emphasize again, that it seems to be that this is simply a device, it is a device under the applicable section of F.E.L.A., Section 55 and Section 60 – it is a device that is being employed by the railroad – by the Railroads here – to chill, discourage and to defeat the only right of recovery that this employee may be able to assert.

Whether he can prove it is something that we face at trial. But if he is going to be faced with this kind of threat, I don't know that he is in a position in which it can be maintained.

I would encourage the Court not to permit this counterclaim in this litigation for the reasons that we have set forth.

THE COURT: All right. Thank you. Thank you, very much, Mr. Wilson.

MR. WILSON: You're welcome.

THE COURT: The Plaintiff's motion before the Court is in two parts. There is a Motion for Judgment on the Pleadings or in the alternative, a Motion to Dismiss.

In looking to the very excellent briefs that have been filed in this matter on both sides, and in looking to the record that is now before the Court, let me dispose of the first motion rather quickly.

The Court does not believe under the present state of the circumstances, that a motion for Judgment on the Pleadings should be granted at this point. So that will be denied.

It seems that the proper forum to consider the issues that have been so ably developed on both sides of this issue is the Plaintiff's Motion to Dismiss. So the Court will address that issue, or address these various issues, and within the context of that.

The action must be looked at from the standpoint of being Plaintiff's claim under the Federal Employers Liability Act. And we begin with the premise that the Plaintiff was at the time of his alleged injuries a railroad employee. The train that he was allegedly performing his duties was involved in a collision.

The Plaintiff makes certain allegations against the Railroad and its employees, to the effect that they failed to give proper signals that another train was on the track.

And perhaps that there was a malfunctioning of equipment. Perhaps that there was a failure of crew members to perform their duties competently, or negligently. Especially as to the employees of the approaching train and so forth. We will not get into those allegations except to the extent that it is necessary to note that Plaintiff has based his claim upon the alleged negligence of the Defendants, their agents, officers, servants and employees. This as defined by the Federal Employers Liability Act.

The Defendants in their Answer, seeks counterclaim relief against the Plaintiff for property damages. It is interesting to note that Plaintiff seeks one and a half million dollars in damages; his wife seeks a half-million dollars in damages. And the damages to the property of the Railroads is alleged to have amounted to 1.7 Million Dollars.

Now, with that background in mind it would seem that we need to understand that the starting point for a determination of whether the Railroads here, sued by an employee under the Federal Employers Liability Act, may assert a counterclaim and must start with Section 1 of the Act; being 45 U.S.C. Section 51.

The Act under which this cause is brought was a legislative product of the Congress, which by its very terms and by the Congressional background for the Act was intended to liberalize the remedies available to Railroad employees who sustained alleged injuries during the course of their employment.

The Safety Appliance Act and the Boiler Inspection Act Act were designed to protect both the public, as well as the workers. But the Federal Employers Liability Act was designed to provide a liberal remedy to workers of the railroad system of the nation. And it must also be noted that Congress, by the use of contributory negligence in a

compara-negligence sense, determined that the adjustment to the cost of injuries should be borne equitably between the employee and the employer.

The Act, as the Court understands the decisions construing the Act in its totality, must be construed liberally. And it would appear that Congress and the subsequent interpretations of the Act, demonstrate that the Act was intended to supersede the common law and was intended to be an exclusive remedy for injured railroad workers.

In some ways the act reduces the rights of the workers or may reduce the rights of workers as compared with those causes of action that an injured railroad employee would have received under the common law prior to the Act.

The Act prohibits, it seems, the extension or reduction of liabilities against the railroad. For example, by state law; by state legislative enactments.

The amount or type of recovery by the worker, it seems, is limited to the four corners of the statute involved. Now, recognizing that the Plaintiff has in the Amended Complaint, sought loss of consortium. The railroad employee may not be able to recover for a loss of that nature, or perhaps may not be entitled to recover punitive damages. These are matters that are just mentioned in passing. They may, or may not, have application to the litigation as it develops.

The only reason these are mentioned just in passing, and not as any determination of the issues, if they should arise here, is to point out that the Federal Employers Liability Act was designed to provide an exclusive remedy for injured railroad workers. And to balance the blame, if you will, as to contributory negligence in the sense of contributory negligence.

There is another area that the Court believes that we should look to and that is Section 55 of the Act, which provides in part. "--any device whatsoever, the purpose of which would be to enable a common carrier to exempt itself from any liability created by the chapter, shall to that extent, be void."

The question -- the very interesting question that brings itself forward is whether the counterclaim, and when read in light of Section 55, is a manifestation of actions by the railroad that is void because of public policy? And an attempt to avoid F.E.L.A liability.

There is a case from Michigan, the District Court there, that is helpful in looking to this aspect of it. That is Kozar v. Chesapeake and Ohio Railroad Company, 320 F. Supp. 335, a 1970 decision.

In looking to that, of course, you have earlier both mentioned in passing, the Stack case and that is a very interesting decision.

The question of whether this counterclaim can be considered a device intended to enable these Defendants to exempt themselves from any liability created by the Federal Employers Liability Act, is to be considered.

The decision in the Stack case has been very helpful to the Court; the reasoning, the expressions and the thought that that Court set forth there.

The Court recognizes, as counsel for the defense pointed out, that the Stack decision is not binding, but it is at least, helpful.

So, in pulling these general thoughts together in this matter, the Court believes that as we look at the F.E.L.A.

Act in its entirety, and as we look to Section 55 in particular, that the counterclaim in this action must be construed to be a device designed to relieve the Railroad of its statutory liability to pay in full, or in part, for any alleged loss suffered by an employee as a result of the negligence of the Railroad, or its agents, or employees.

The Court believes that a counterclaim, when look at the statutes here employed, is a device that would be against public policy.

Now, the defense may have a very equitable argument in the matter, but it seems that this is a matter that must be addressed by the Congress and not by the Court.

And Plaintiff's position may have merit that allowing a counterclaim of this nature would have a chilling effect upon an injured railroad employee.

There is also another aspect of this that must not be overlooked from the practical side of litigation and that is the Congressional protection that is afforded the presentation of information.

Section 60 prohibits the harassment or coercion of persons who would have information.

Now, the Court does not believe that it is necessary to pass on that particular aspect of it, but as Plaintiff points out, it may inhibit the voluntary furnishing of information by let's say -- the other employees who were in some way involved with the collision that is the subject matter of this litigation.

So bringing it down to the ultimate conclusion, the Court believes that the Plaintiff's Motion to Dismiss the Counterclaim for property damage is well taken. The counterclaim for property damage, the Court believes,

should not be allowed in F.E.L.A. actions such as we have here and now before this Court.

I will ask counsel for the Plaintiff, since they are the prevailing parties in this matter, to prepare an order granting the Motion to Dismiss the Counterclaim of the Railroad Defendants, in keeping with the matters that have been expressed by the Court here and now on the record in this civil action.

I will have you submit that, if you will, to counsel for Defendants for approval as to form. And then if they will forward it on to me, it will be entered bringing this matter up to date.

MR. WILSON: Could we, before starting to prepare that order, have a transcript of the Judge's remarks? Or will we need it?.

THE COURT: I wouldn't think that you would need them. But I would be glad to have Mr. Bell do that.

MR. WILSON: Does the Court want us to set down the reasons advanced by the Court for the dismissal of the counterclaim?

THE COURT: Perhaps the conclusions would be enough.

MR. WILSON: In order to state those accurately, I would like to have a transcript.

THE COURT: All right. That may be done.

MRS. AYRES: Your Honor, as I understand it, there is a provision under federal statutes for -- requesting of the Court, findings of fact and conclusions of law on this kind of interlocutory order, which permits the order to be taken

up on appeal, immediately, rather than at the end of a trial proceedings.

We may make such a motion, but I do not know at this time.

THE COURT: All right.

MR. MARTIN: I was going to raise that, Barbara.

MRS. AYRES: Pardon?

MR. MARTIN: I was about to raise that, to take it upon on an interlocutory order. And get it settled down, so that we know what we are going to try when we get to it.

MRS. AYRES: Yes. I suspect that that may be appropriate in this situation.

MR. MARTIN: I think it would.

THE COURT: All right. Well, you can talk with your clients about that --

MRS. AYRES: -- we will notify the Court promptly, if we will be making a motion for consideration on that expedited appeal procedure.

THE COURT: All right. We will be glad to have your thoughts on that. And we will look to the statutes and be glad to work with you in considering that issue. I don't know whether that's a matter that has to be certified by the Court, or whether you can do that on your own, or whether the Fourth Circuit must ask -- you must ask permission for the interlocutory appeal. We will just have to look at that. But we will be certainly glad to work with you on that to bring it to a conclusion that hopefully will be right and proper.

MRS. AYRES: Okay. Thank you very much, your Honor.

MR. WILSON: It's in that connection that I am concerned with getting a transcript of the Court's remarks.

As I understand the Court's ruling, there were no factual issues as such that the Court made findings of fact on . The Court ruled upon this as a matter of interpretation of the F.E.L.A.

MR. MARTIN: Well, I would define the chilling effect as a finding of fact. That's my feeling about it.

THE COURT: All right.

MRS. AYERS: I think it would be helpful to both sides to have a transcript of this entire hearing available, if that is possible.

THE COURT: All right. Mr. Bell nods that he can make that available for you.

MR. AYERS: Thank you.

MR. WILSON: Thank you.

MR. MARTIN: Thank you, Judge.

THE COURT: Thank you all very much.

(Whereupon, this concluded this phone conference call at this time.).

CERTIFICATE OF COURT REPORTER:

I, JOHN G. BELL, Official Court Reporter for the U.S. District Court, sitting at Elkins, do hereby certify that the foregoing transcript of matters had in a telephone conference call in this matter on March 24, 1982, is a true and correct transcript of said matters to the best of my knowledge and belief.

_____

JOHN G. BELL
Registered Professional Reporter

## APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| OZIE B. SHIELDS, JOSE A. QUINONES and ABIMAEL RAMOS, Plaintiffs, | : | |
| -against- | : | 81 CIV. 4204 (CBM) |
| CONSOLIDATED RAIL CORPORATION, C & A CARBONE PRIVATE SANITATION INC. and ANGELO P. FUCCI, Defendants. | : | |

APPEARANCES

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*Attorneys for Defendant*
*Consolidated Rail Corp.*

## MEMORANDUM OPINION

This Action arose out of an automobile accident in which a truck in which plaintiffs were riding, owned by their employer Consolidated Rail Corporation (Conrail), collided with another truck. The accident occurred in New Jersey. Plaintiff Shields, the driver of the truck, and the two other plaintiffs, Quinones & Ramos, were injured in the accident.

Plaintiffs sued Conrail, their employer, alleging liability under the Federal Employers Liability Act, 45 U.S.C. § 51 *et. seq.* (FELA). They also sued C & A Carbone Private Sanitation Inc., the owner of the other truck involved in the accident, and Angelo P. Fucci, the driver of that truck. By memorandum opinion and order dated December 3, 1981, this court granted Carbone's motion to dismiss the complaint for lack of subject matter jurisdiction. Angelo P. Fucci has not yet been served in this action.

Defendant Conrail interposed a counterclaim against Shields, seeking indemnification from Shields, who was driving the truck, in the event that Conrail is required to pay any damages to plaintiffs Quinones and Ramos. The basis for this counterclaim is Conrail's allegation that Shields' negligence caused the accident and the resulting injuries to Quinones and Ramos. Plaintiffs have moved to dismiss the counterclaim under Rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure on the ground that this court lacks subject matter jurisdiction and that the counterclaim fails to state a claim upon which relief can be granted. This court agrees with plaintiffs' second contention--that the counterclaim fails to state a claim--and grants plaintiffs' motion to dismiss the counterclaim.

The starting point for a determination of whether a railroad, sued by an employee under the FELA, may assert a counterclaim against the employee for indemnification is Section 1 of the Act, 45 U.S.C. § 51. This section, which provides railroad employees with a federal right to sue for damages for certain type of job-related injuries, provides that a railroad is liable in damages for injuries to employees "resulting in whole or in part from the negligence of any of the officers, agents, *or employees of such carrier*" (emphasis added). This section was designed to achieve the broad purpose of promoting "the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." S.REP. NO. 460, 60th Cong., 1st Sess. 3. In construing this section, the Supreme Court has observed:

> [W]hile the common law had generally regarded the torts of fellow servants as separate and distinct from the torts of the employer, holding the latter responsible only for his own torts, it was the conception of the legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with

> sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages.

*Sinkler v. Missouri,* 356 U.S. 326, 329-30 (1958) (holding employer liable for injuries of employee caused by the negligence of independent contractor working for the railroad).

It is thus apparent, both from the plain language of the statute and from the Supreme Court's construction thereof, that a railroad is liable when injury to an employee results from the negligence of a fellow employee. Here, through the assertion of its counterclaim, Conrail seeks to achieve that which the Act specifically proscribes: requiring an employee, rather than a railroad employer, to compensate other employees for injuries suffered on the job. To permit Conrail to recover from Shields indemnification for damages Conrail is forced to pay Quinones and Ramos would contravene both the FELA and its stated purpose. Such a result cannot be countenanced.

An alternative basis for dismissing Conrail's counterclaim is § 55 of the FELA which provides in relevant part that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intention of which shall be to enable any common carrier to exempt itself from any liabillity created by this Chapter, shall to that extent be void." This section declares a public policy to void releases or any other devices which evidence an attempt to avoid FELA liability. *Kozar v. Chesapeake & Ohio Railway Co.,* 320 F. Supp. 335, 384 (W.D. Mich. 1970). There is no question that had Conrail entered into a contract with Shields, holding Shields liable for the injuries suffered by

fellow employees on the job, such agreement would not survive under § 55.

The question, then, is whether the counterclaim asserted here, which seeks and will produce a result identical to such a release, can be considered a "device" intended to enable Conrail to exempt itself from any liability created by the FELA. Although there are no cases directly on point, this court has concluded that the counterclaim is such a device and thus void under § 55. *CF. Stack v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 94 Wash.2d 155, 615 P.2d 457 (1980) (Railroad's counterclaim for property damage asserted against employee injured in accident at work was "device" under § 55). To permit the assertion of the counterclaim would enable Conrail to exempt itself from its liability for the negligent acts of its employees, created under § 51 of the FELA, in clear contravention of § 55.

Allowing counterclaims such as the instant one would, in all likelihood, have the effect of discouraging employees from filing FELA actions for fear of being held liable in damages for the injuries suffered by fellow employees on the job. The mere possibility of this occurring casts an impermissible chill on railroad employees' FELA rights. Accordingly, for the reasons discussed above, plaintiffs' motion to dismiss Conrail's counterclaim is granted.

Dated: New York, New York
December 16, 1981

CONSTANCE BAKER MOTLEY
U.S.D.J.

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| CONSOLIDATED RAIL CORPORATION | : | CIVIL ACTION |
| | : | NO. 81-2539 |
| vs. | : | FILED |
| | : | SEP 29 1981 |
| ANTHONY J. DOBIN, SR., Administrator of the Estate of ANTHONY J. DOBIN, II Deceased | : | |
| CLERK | : | |

AND NOW, this 29th day of September, 1981, defendant's motion to dismiss is denied for the following reasons:

1. Plaintiff has adequately pleaded the basis of the court's subject matter jurisdiction. 28 U.S.C. § 1332(a) (1981).

2. There is a common law right of action by a master against its servant "for property damage arising out of ordinary acts of negligence committed within the scope of employment." *Stack v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 94 Wash. 2d 155, 615 P. 2d 457, 459 (1980); *Greenleaf v. Huntingdon & B.T.M.R. & Coal Co.*, 3 F.R.D. 24, 25 (E.D. Pa. 1942).

3. The Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 et seq., sets forth the grounds under which a railroad employee may recover from its employer for personal injury incurred while working. The provisions of the FELA do not abrogate the railroad's common law right

against its employees for property damage caused by their negligence.

4. I decline to adopt the reasoning of *Stack,* that a suit by a railroad against its employee for property damage is a "device whatsoever" either designed to relieve the railroad of liability or to prevent other employees from furnishing voluntary information regarding the facts incident to the injury or death of the defendant employee. *Stack, supra,* a5 459-61. See 45 U.S.C. §§55 & 60 (1972). *See also Kentuck & Indiana Terminal R.R. Co. v. Martin,* 437 S.W. 2d 944 (Ky.) (1969) (bifurcated approach adopted in trial of employee FELA claim and railroad counterclaim for property damage).

BY THE COURT:

/s/ _____

## APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, KENTUCKY

NO. C78-0313 (A)

CARL KEY

PLAINTIFF,

vs.

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY,

DEFENDANT

**ORDER**

* * * * * *

The court being advised, Plaintiff's Motions to Dismiss the Counterclaim or to Sever the Trial of the Counterclaim from the Trial of Complaint, are both overruled, and this action is retained on the docket of this Court for all further proceedings and the show cause order entered herein is satisfied.

/s/_____

JUDGE

## CERTIFICATE

I certify that a copy of this Order was mailed this 17 day of May, 1979 to Messrs. David H. Adamson, III, 1326 Niedringhaus Avenue, Granite City, Illinois, 62040 and Edwin Baer, 310 West Liberty Street, Louisville, Kentucky, 40202, Attorneys for Plaintiff.

/s/_____

## APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| EDWARD EUGENE COOK<br>Plaintiff, | ) | |
| -vs- | ) | No. CIV-75-0791-D |
| ST. LOUIS-SAN FRANCISCO RAILWAY CO., A Corporation<br>Defendant. | ) | |
| | | (Consolidated) |
| ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,<br>PLAINTIFF, | ) | |
| -vs- | ) | No. CIV-76-0289-D |
| DAVID BASKETT,<br>Defendant. | ) | |

### ORDER

Upon motion of Defendant St. Louis-San Francisco Railway Company filed herein on June 21, 1977, the Court finds that the judgments on the jury verdicts entered in Case No. civil 75-0791-D, *supra,* on the 28th day of February, 1977 in favor of Plaintiff Edward Eugene Cook and against Defendant St. Louis-San Francisco Railway Company for $46,000 and in favor of Defendant St. Louis-San Francisco Railway Company on its counter-claim against Plaintiff Edward Eugene Cook for

$1,197,250.98 should be set off against each other. The Court on June 22, 1977 requested the Plaintiff to respond to said Motion on or before July 7, 1977 and do so with supporting Brief if the Motion is opposed. Plaintiff has failed to comply with this request of the Court.

The Court further finds that, as a result of said set-off, Plaintiff Edward Eugene Cook's judgment against Defendant St. Louis-San Francisco Railway Company is fully satisfied, and that Defendant St. Louis-San Francisco Railway Company's judgment against Plaintiff Edward Eugene Cook is reduced to the amount of $1,151,250198. The Court further finds that Defendant's judgment in said reduced amount shall bear interest from the 28th day of February, 1977.

It is so ordered this 3d day of August, 1977.

/s/ _____
Fred Daugherty
United States District Judge

No. 83-1943

# In the Supreme Court of the United States

**October Term, 1983**

ROBERT M. CAVANAUGH,
*Petitioner,*

vs.

WESTERN MARYLAND RAILWAY COMPANY AND BALTIMORE AND OHIO RAILROAD COMPANY,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR UNITED TRANSPORTATION UNION AS AMICUS CURIAE

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# In the Supreme Court of the United States

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---

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---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

---

The United Transportation Union ("UTU") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consents of the attorneys for the respondents were requested but refused.

The interest of the UTU in this case arises from the fact that it is a national labor organization certified under the Railway Labor Act to represent employees of the nation's railroads in the classes or crafts of employment as switchmen, trainmen, conductors and employees in engine service. It represents over 160,000 members in train service in the United States. Each of these railroad workers is potentially affected by the circuit court's holding that

a carrier may maintain a claim for property damage to the carrier's equipment based upon the employee's negligence as a counterclaim in an action brought by the employee seeking damages for personal injuries under the Federal Employers Liability Act, 45 U.S.C. § 51 et seq. This holding is in direct conflict with the contrary holding of the Supreme Court of Washington, disallowing a property damage counterclaim in an FELA action. *Stack v. Chicago, M., St. P. & Pac. R.R. Co.*, 94 Wash.2d 155, 615 P.2d 457 (1980). The allowance of such a counterclaim, or of a direct action against the employee for property damage, has a severe and chilling effect upon the ability of UTU's members to enforce their rights under the FELA.

Also, UTU's members enjoy rights under the Railway Labor Act, 45 U.S.C. § 151 et seq., which provides the exclusive mechanism for resolving minor disputes between employers and employees within the railway industry. A property damage action—whether directly brought or by way of counterclaim—is precluded by the Railway Labor Act. To allow such litigation will frustrate the salutary purpose of the Act to facilitate settlement of all railway disputes and will encourage frequent resort to the assertion of claims outside the framework established by the Act. In this way, the circuit court's holding has an immediate effect upon every railroad worker and upon the railway industry as a whole.

In the instant case, both in the court of appeals and in his petition, petitioner's contentions focus on the FELA and do not include the preclusive effect of the Railway Labor Act upon common law actions brought by carriers against their employees. The brief which *amicus curiae* is requesting permission to file will contain arguments concerning the preclusive effect of the Railway Labor Act upon such common law claims, asserted either in a

counterclaim to an FELA action or in a separate action. If this argument is accepted, it would be dispositive of this case.

Respectfully submitted,

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# In the Supreme Court of the United States

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*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR UNITED TRANSPORTATION UNION AS AMICUS CURIAE

## INTEREST OF THE UNITED TRANSPORTATION UNION

The interest of the United Transportation Union is set forth in the motion for leave to file this brief amicus curiae in support of the position of petitioner.

## SUMMARY OF ARGUMENT

I. The right of a railroad worker to seek redress for personal injuries caused by the negligence of his employer is governed exclusively by the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("FELA"). The FELA supplants state law with a uniform system of liberal remedial rules. *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371

(1953). The threat of economic coercion by railroad carriers is anticipated and remedied in the FELA by provisions which render void, *inter alia*, any "device whatsoever" by which the railroad may ultimately exempt itself from liability or which may prevent an employee from voluntarily furnishing information concerning a railroad injury or death. 45 U.S.C. §§ 55 and 60.

A counterclaim for property damage asserted by a carrier in an action brought by its employee under the FELA, or an independent action on this basis—both now sanctioned by the court of appeals—violate both the letter and spirit of the FELA. They constitute potent economic weapons, or "devices," by which the carrier may effectively exempt itself, in whole or in part, from liability to its employee under the FELA. The decision of the court of appeals, sanctioning these actions, is in direct conflict with the decision of the Supreme Court of Washington in *Stack v. Chicago, M., St. P. & Pac. R.R. Co.*, 94 Wash.2d 155, 615 P.2d 457 (1980) (en banc). Certiorari should be granted to resolve this conflict and to avoid the disparity and uncertainty in the application of the FELA that would otherwise result, frustrating Congress' intent to provide a uniform system of recovery for injured railroad workers.

II. The opinion of the court of appeals, in deciding whether the railroad could counterclaim for property damage in an FELA action, reached the interrelated issue of whether railroads are entitled to initiate negligence actions against their employees for property damages. The court of appeals' summary resolution of this issue preordained its determination of the counterclaim question. The court, however, failed altogether to consider the preclusive effect of the Railway Labor Act, 45 U.S.C. § 151 et seq., on this issue. A significant issue contemplated within the questions framed by the petition for certiorari is thus whether

the Railway Labor Act preempts the availability of a carrier's negligence action against its employee for property damages.

The Railway Labor Act establishes an exclusive mechanism for resolving "minor disputes" between carriers and their employees. These dispute resolution procedures are mandatory and exclusive, preempting common law claims based upon the employment relationship. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972). The "minor disputes" remitted to negotiation and arbitration by the Railway Labor Act include claims "founded upon some incident of the employment relation, or asserted one, independent of those covered by collective agreement, e.g., claims on account of personal injuries." *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945). A carrier's claim for property damage based upon its employee's negligence occurring in the employment relationship is a "minor dispute," the resolution of which is committed to the grievance and arbitration procedures of the Act.

The legislative history of the Act and the pronouncements of this Court make it clear that the dispute resolution mechanisms of the Act were mandatory and exclusive, designed to preclude resort to other means of dispute resolution, including resort to the courts. *See Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978). To allow the carrier's claim for property damage is contrary to the Railway Labor Act and defeats its salutary purpose of facilitating prompt and orderly settlement of all railway disputes. Certiorari should be granted to consider this significant issue crucial to the viability of the comprehensive statutory scheme Congress provided for this area so vital to national commerce.

## ARGUMENT

### I.

**The Decision of the Court of Appeals Raises a Number of Significant Issues, Never Resolved by This Court, Concerning the Construction and Operation of the Federal Employers' Liability Act. Moreover, the Resolution of These Issues by the Court of Appeals Conflicts Directly With Their Contrary Resolution by the Washington State Supreme Court, Presenting the Need for Resolution of This Conflict to Insure Uniformity in the Operation of the Act.**

The petition for certiorari, as well as the conflict between the majority opinion in the court of appeals and the dissent by Judge Hall—relying upon *Stack v. Chicago, M., St. P. & Pac. R.R. Co.*, 94 Wash.2d 155, 615 P.2d 457 (1980) (en banc)—demonstrate that a number of significant and recurring questions concerning the construction and operation of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq., are raised. Permitting the carrier to assert in an FELA action a counterclaim for property damage based on the negligence of its employee, as well as to assert such a claim in an action initiated by the carrier—both recognized by the court below—is inconsistent with a number of provisions of the FELA as well as the policies it seeks to advance. The possibility of such counterclaims or separate actions—virtually unheard of until recently but now sanctioned by the court of appeals—will provide the railroads with a new and potent economic weapon that can and will be used to frustrate the rights of employees under the FELA, upsetting the careful balance between industry and labor in an area that is critical to national commerce. Moreover,

since the carrier's claim will be a creature of state law, the invitation posed by the court below will result in disparity and uncertainty in the application of the FELA, frustrating Congress' intent to provide a uniform system of recovery for injured railroad workers. Certiorari should accordingly be granted to resolve these substantial issues so vital to our national economy.

The FELA, "an avowed departure from the rules of the common law . . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 329 (1958). The Act imposes on carriers a liability to compensate "any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence" of the carrier. 45 U.S.C. § 51. It created a new federal remedy in derogation of common law, sweeping away a number of defenses such as assumption of risk, contributory negligence, and the fellow servant rule, which had left railroad workers to bear the burden of these injuries inherent in railroad work. "[T]he general congressional intent was to provide liberal recovery for injured workers . . . ." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). Moreover, "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Id.* Thus, the FELA, "supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act." *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371 (1953). *See Norfolk & Western R.R. Co. v. Liepelt*, 444 U.S. 490, 493 n.5 (1980); 42 Cong. Rec. 4434 (1908) ("It is hoped to

fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees.")[1]

Amicus is concerned that the decision below allowing employer counterclaims and independent actions will undermine "the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers" and will frustrate the "uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361-62 (1952). Following the passage of the Act, one of its authors, Edward A. Moseley, first Secretary of the Interstate Commerce Commission, expressed concern about a forthcoming campaign against the Act by railroad lawyers:

> The railroad companies have the strongest array of legal talent in the country, and this talent will all be directed toward defeating the ends of any such law as this. No private individual can hope to cope with such power . . . .

Quoted in Griffith, *The Vindication of a National Public Policy under the Federal Employers' Liability Act*, 18 *Law & Contemp. Probs.* 160, 171 (1953). Congress attempted to respond to this problem by providing that "[a]ny contract, rule, regulation, *or device whatsoever*, the purpose or intent of which shall be to enable any common carrier to

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1. In addition to the FELA, Congress enacted the Safety Appliance Acts, 45 U.S.C. §§ 1-16, the Locomotive Inspection Acts, 45 U.S.C. §§ 17-23, and the Hours of Service Act, 45 U.S.C. §§ 61-66. These Acts were passed to promote the safety of railroad operations. *Urie v. Thompson*, 337 U.S. 163 (1949); *Carbon County Ry. Co. v. United States*, 309 F.2d 938 (10th Cir. 1962). The violation of these additional Acts result in liability under the FELA, and the railroad is held strictly liable in damages. *Myers v. Reading Co.*, 331 U.S. 477 (1947). These additional Acts are to be construed together with the FELA, and together with it, constitute a comprehensive statutory scheme for facilitating employee recovery. *Urie v. Thompson*, 337 U.S. 163, 189 (1949).

exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C. § 55 (emphasis added).

The authors of the FELA also "recognized the danger 'that railroad agents would coerce or intimidate employees to prevent them from testifying.' " *Stark v. Burlington N. Inc.*, 538 F.Supp. 1061, 1062 (D. Col. 1982), quoting *Hendley v. Central of Ga. R.R. Co.*, 609 F.2d 1146, 1150 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981). To meet this danger Congress provided that:

> [a]ny contract, rule, regulation, *or device whatsoever*, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information [shall be guilty of a crime].

45 U.S.C. § 60. Section 60 was designed "to attempt to equalize the access to information available to the highly efficient claims department of the railroads and to the individual F.E.L.A. claimants and to prohibit the promulgation and enforcement of rules which would inhibit the free flow of information to claimants." *Stark, supra* at 1062; *see* Sen. Rep. No. 661, 76th Cong., 1st Sess. 2, 5 (1939).

In these two provisions Congress used exceedingly broad language, including the phrase any "device whatsoever" to indicate that these safeguards were "to have the full effect that its comprehensive phraseology implies." *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 265 (1949) (quoting *Duncan v. Thompson*, 315 U.S. 1, 6 (1942)). As

Judge Hall in his dissenting opinion below found, quoting from the unanimous en banc opinion of the Supreme Court of Washington in *Stack v. Chicago, M., St. P. & Pac. R.R. Co.*, 94 Wash.2d 155, 159, 615 P.2d 457, 459 (1980), "the railroad's counterclaim and third-party claim constituted 'devices to deprive plaintiffs of their right to an adequate recovery and operated to chill justifiable FELA claims in violation of 45 U.S.C. §§ 55 and 60.' " *Cavanaugh v. Western Md. Ry. Co.*, 729 F.2d 289, 295 (4th Cir. 1984) (Hall, J. dissenting). There is serious concern that "the filing of such counterclaims will unfairly coerce or intimidate the injured employee from filing and pursuing his FELA action." *Id.* Indeed, counsel for the railroads in *Cavanaugh* candidly acknowledged at oral argument before the district court that railroads generally do not bring actions against their employees for property damage because they have no reasonable expectation of recovery and their employees in any event may be judgment proof, but that the counterclaim asserted in *Cavanaugh* was filed (approximately one year and nine months after the accident) only when the employee instituted his FELA action and in order to diminish his recovery. *Id.* at 295 n.1. In view of this, Judge Hall found it clear "that the railroads filed their counterclaim either to coerce Cavanaugh into settling his claim or, if his FELA action proceeded to trial, to strip him of any damages by means of an offset. I cannot agree that Congress intended to sanction such a motive." *Id.* Accordingly, Judge Hill wrote that:

> In my view, the railroads' counterclaim is a "device" calculated to intimidate and exert economic pressure upon Cavanaugh, to curtail and chill his rights, and ultimately to exempt the railroads from liability under the FELA. Here, as in *Stack*, the railroads' counterclaim violates 45 U.S.C. § 55 "because the ultimate threat of 'retaliatory' legal action would have

> the effect of limiting [the railroads'] liability by discouraging employees from filing FELA actions. Further, it would have the effect of reducing an employee's FELA recovery by the amount of property damage negligently caused by the employee." 94 Wash.2d at 160, 615 P.2d at 460. To allow the railroads' counterclaim to proceed would pervert the letter and spirit of the FELA and would destroy the FELA as a viable remedy for injured railroad workers. The result sought by the railroads, and accepted by the majority, defies common sense and is repugnant to the general goal of the FELA to compensate railroad workers for the injuries negligently inflicted by their employers.

*Id.* at 296.[2]

Whether a counterclaim in an FELA action such as the one involved in the instant case—concededly filed on a retaliatory basis to diminish the statutory right to recovery—constitutes a "device" to frustrate the purposes of the FELA in violation of 45 U.S.C. §§ 55 and 60, presents a significant question never resolved by this Court, and one on which there is a direct conflict between the decision of the court of appeals and the decision of the Su-

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2. *See also Shields v. Consolidated R. Corp.*, No. 81 Civ. 4204 (CBM) (S.D.N.Y. Dec. 16, 1981), Pet. App. 51a, 55a ("Allowing counterclaims such as the instant one would, in all likelihood, have the effect of discouraging employees from filing FELA actions for fear of being held liable in damages for the injuries suffered by fellow employees on the job. The mere possibility of this occurring casts an impermissible chill on railroad employees' FELA rights."); *Kozar v. Chesapeake & Ohio Ry. Co.*, 320 F.Supp. 335, 383 (W.D. Mich. 1970) ("If threats, coercion, economic pressure or other devices effectively curtail or deter an injured employee's resort to Federal Employers' Liability Act relief, or result in unjust settlements for injured employees and beneficiaries, then the purpose of Congress is thwarted and the individual is deprived of both his remedy and his forum, and injustice prevails.")

preme Court of Washington in *Stack*. The court of appeals' decision stands as an open invitation to railroads to utilize counterclaims or the initiation of independent lawsuits to chill the exercise of FELA claims, to deter the provision of information by witnesses who might themselves then be named as defendants in such actions, and to coerce inequitable settlements of claims, all in violation of the remedial purposes of the Act. This possibility[3] threatens

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3. That the increased utilization of counterclaims and independent actions by carriers against their employees in response to the recent invitation of the *Cavanaugh* court is not mere speculation is indicated by *Burlington N. R.R. Co. v. McNaulty*, No. 84-0162 (D. Wyo., complaint filed, April 24, 1984) (independent action by railroad against brakeman injured in railroad collision for property damage based on negligence and indemnification and contribution for amount carrier may be obligated to pay injured crew members of the involved trains).

The initiation by carriers of individual negligence actions against their employees, sanctioned by the court of appeals, also raises a substantial question under § 56 of the FELA, 45 U.S.C. § 56, which contains a three year statute of limitations, and provides a liberal venue provision giving plaintiffs a wide choice of forums. This venue provision has been recognized as "a privilege created by federal statute," *Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 52 (1941); *see also Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 265 (1949) (recognizing plaintiff's venue choice as a substantial right). In 1947 Congress considered a proposed amendment to limit the FELA plaintiff's venue privilege, which had been urged by the railroad industry. Congress rejected this proposed amendment, leaving intact the liberal venue privilege provided by § 56. *See* 93 Cong. Rec. 9103-07 (1947); H. R. Rep. No. 613, 80th Cong., 1st Sess., Pts. 1, 2 & 3 (1947); *id.*, Pt. 3, at 7 (remarks of Congressman Feighan in favor of maintaining liberal venue choice for FELA plaintiffs).

Allowing the railroad to file an independent action against its employee based upon the same occurrence giving rise to an FELA claim would totally undermine the employee's venue choice under § 56. *McNaulty, supra*, is illustrative. The railroad raced to the courthouse to file its action two days after the collision that injured the employee. If the carrier can file suit immediately, forum shopping on the part of the carrier to select a favorable jurisdiction, *e.g.*, one with a modified or pure comparative negligence standard, would become a general practice. In such cases the employee would be required to file a compulsory counterclaim in the forum selected by the carrier in order to preserve his FELA claim. This would totally frustrate

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the viability of a comprehensive statutory scheme to promote safety of railroad operations and liberal recovery for railroad employees suffering injury in the course of employment. Certiorari should accordingly be granted to resolve these significant and recurring issues.

II.

**The Decision of the Court of Appeals Raises Significant Issues Under the Railway Labor Act, Which by Establishing an Exclusive Grievance and Arbitration Procedure for Resolving Disputes Between Carriers and Their Employees, Precludes the Availability of a State Common Law Tort Claim for Property Damage Against an Employee Founded Upon the Employment Relationship.**

Not only is a state common law tort claim for property damage by the carrier against its employee inconsistent with the FELA, but it is also precluded by the grievance

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Footnote continued—

the forum selection privilege provided to FELA plaintiffs by Congress in § 56. *See Baltimore & O. R. Co. v. Kepner, supra.*

In *Kepner, supra,* the employee, an Ohio resident, filed an FELA action in New York. The carrier initiated an action in Ohio state court, invoking the common law power of the Ohio courts to enjoin the continued prosecution of an action in another forum by an Ohio resident where the plaintiff's choice of the other forum was vexatious and inequitable. This Court found that the FELA plaintiff's venue right conferred by § 56 could not be overcome by this otherwise legitimate state interest in preventing harassing litigation in inconvenient forums. For the same reason, the FELA plaintiff's venue right may not be frustrated by allowing a common law tort action by the carrier against his employee growing out of the same occurrence giving rise to an FELA claim. Congress enacted § 56 to avoid "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier with consequent increased expense for the transportation and maintenance of witnesses, lawyers, and parties away from their homes." *Baltimore & O. R. Co. v. Kepner, supra,* at 49-50; Sen. Rep. No. 432, 61st Cong., 2d Sess. 4 (1910). Allowing independent actions by the carrier would frustrate this policy as well as that of the three year statute of limitations accorded by § 56.

and arbitration procedure provided by the Railway Labor Act, 45 U.S.C. § 151, et seq., the exclusive mechanism for resolving minor disputes between employers and employees in the railway industry. The declared purpose of the Railway Labor Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." 45 U.S.C. § 151a(1). Congress established a mechanism "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5).

> The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. Carriers are therefore required to negotiate with bargaining representatives of the employees. . . . The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.

*Slocum v. Delaware L. & W. R.R. Co.*, 339 U.S. 239, 242 (1950).

Grievance and arbitration procedures are established for "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." 45 U.S.C. § 153, First (i). Among the mechanisms established was the National Railroad Adjustment Board, "a congressionally designated agency peculiarly competent in this field." *Slocum*, *supra*, at 244. Although the statutory language at first reading seems to make referral of disputes to the Adjustment Board optional, and although the statute was so read in *Moore v. Illinois Cent. R.R. Co.*, 312 U.S. 630 (1941), this Court has repudiated that ruling

and held that the Act's dispute resolution procedures are mandatory and exclusive. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322 (1972) ("[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law."); *Walker v. Southern Ry. Co.*, 385 U.S. 196, 198 (1966) ("[T]he Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board"); *Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 39 (1957) ("[T]he provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field"). The board has "exclusive primary jurisdiction," *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548, 552 (1959), and is the "mandatory, exclusive, and comprehensive system for resolving grievance disputes." *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963).

As a result of the exclusive nature of this dispute resolution mechanism, no federal or state court has jurisdiction over the merits of any dispute subject to determination by the Adjustment Board. *Andrews, supra; Locomotive Eng'rs, supra*, at 37; *Pennsylvania R.R. Co., supra*, at 552-54; *Slocum, supra*. The Railway Labor Act thus preempts state law in this field and constitutes "a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum, supra*, at 244. The courts have accordingly dismissed common law actions brought in federal or state court asserting tort or contract claims based upon the employment relationship. *E.g., Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972) (employee's claim for damages for alleged wrongful dis-

charge); *Jackson v. Consolidated R. Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984) (employee's state tort action for retaliatory discharge); *Choate v. Louisville & Nashville R.R. Co.*, 715 F.2d 369 (7th Cir. 1983) (employee's tort claim of intentional infliction of emotional distress); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978) (employee's claim of common law intentional infliction of emotional distress); *de la Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978) (employee's tort action for malicious deprivation of benefits); *Sharkey v. Penn Central Transp. Co.*, 493 F.2d 685 (2d Cir. 1974) (employee's claim for damages for mental distress based on wrongful discharge); *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D. Md. 1981) (employee's claim for false imprisonment and defamation); *Carson v. Southern Ry. Co.*, 494 F.Supp. 1104 (D.S.C. 1979) (employee's defamation claim); *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274 (Ky. App. 1979) (employee's libel action).[4]

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4. The courts have consistently rejected the contention that the exception to the preemption doctrine recognized in the context of the National Labor Relations Act, 29 U.S.C. § 151 et seq., by such post-*Andrews* cases as *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) and *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), apply in the context of the Railway Labor Act. E.g., *Jackson v. Consolidated R. Corp.*, 717 F.2d 1045, 1052 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984) ("[T]he difference between the impact of the NLRA and the RLA has significance. The focus of the NLRA is on specific conduct that Congress has deemed subject to either prohibition or protection. . . . In contrast, the RLA has made any grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that Act, 45 U.S.C. § 153 First (i). It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA."); *Choate v. Louisville & Nashville R.R. Co.*, 715 F.2d 369, 370-372 (7th Cir. 1983); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367, 1369 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978); *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853, 855-57 (D. Md. 1981); *Pandil v. Illinois Cent. Gulf R.R. Co.*, 312 N.W.2d 139, 143 (Iowa App. 1981); *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274, 281-83 (Ky. App. 1979).

Although these cases concerned common law actions brought by employees, it is plain that identical considerations support preclusion of common law actions brought by carriers when the subject matter of the action is committed to the grievance and arbitration procedure of the Act. *Order of Ry. Conductors of America v. Southern Ry. Co.*, 339 U.S. 255 (1950) (state court held without power to adjudicate dispute brought by a railroad); *see Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963) (either party may take dispute to Arbitration Board and "the other party may not defeat this right by resort to some other forum."); *Brotherhood of Railroad Trainmen v. Chicago R. & Ind. R.R. Co.*, 353 U.S. 30, 34 n.8 (1957) (statutory language supports no distinction); *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 725 n.18 (1945) ("the obligation [to negotiate and arbitrate] is not partial. In plain terms the duty is laid on carrier and employees alike").

The petition for certiorari in the instant case recognizes that the opinion of the court of appeals, in deciding whether the railroad could counterclaim for property damage in an FELA action, reached the interrelated issue of whether railroads are entitled "to initiate negligence actions against their employees for property damage . . . ." Pet. 10. The court of appeals' summary resolution of this issue preordained its determination of the counterclaim question. The court, however, failed altogether to consider the preclusive effect of the Railway Labor Act on this issue. A significant issue contemplated within the questions framed by the petition for certiorari is thus whether the Railway Labor Act preempts the availability of a carrier's negligence action against its employee for property damages. Plainly, under the authority discussed above, if such claims are remitted by the Railway Labor Act to the grievance and arbitration procedure established by the statutory scheme, then such property damage

claims, whether asserted by separate action or by counterclaim, would be preempted. The critical inquiry thus becomes whether such a claim for property damage based on negligence on the part of the employee constitutes a "dispute[] . . . growing out of grievances" within the meaning of the Railway Labor Act. 45 U.S.C. § 153 First (i).

The classic definition of the disputes remitted to the negotiation and arbitration procedures of the Railway Labor Act was set forth by this Court in *Elgin, J. & E. Ry. v. Burley,* 325 U.S. 711 (1945). This Court drew the traditional distinction in the railway labor world between major and minor disputes—both of which were committed to the dispute resolution mechanisms of the Act. *Id.* at 722-23. "Minor disputes" relate

> either to the meaning or proper application of a particular provision [of a collective bargain agreement] with reference to a specific situation *or to an omitted case.* In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

*Id.* at 723 (emphasis added). *See also id.* at 724 ("The so-called minor disputes, . . . involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so.")

Although the consequences of property damage caused through an employee's negligence is not usually the subject of a collective bargaining agreement, it does constitute an "omitted case" within the meaning of *Elgin.* It plainly

constitutes a claim "founded upon some incident of the employment relation . . . ." *Id.* at 723. Indeed, the very example offered by the *Elgin* Court—claims on account of personal injuries—is virtually identical.

As this Court indicated in reviewing the circumstances leading up to the 1934 amendments adding the Adjustment Board, "[p]rior to 1934 the parties were free at all times to go to court to settle these disputes." *Elgin, supra,* at 725. "The Adjustment Board was created to remove the settlement of grievances from this stagnating process and bring them within a general and inclusive plan of decision. The aim was . . . to safeguard the public as well as private interests against the harmful effects of the preexisting scheme." *Id.* at 727-28. Thus, after the 1934 amendments, the preexisting practice of resolving these disputes in court was to end. "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and *out of the courts.*" *Union Pac. R. R. Co. v. Sheehan,* 439 U.S. 89, 94 (1978) (emphasis added); *Brotherhood of Railroad Trainmen v. Chicago R. & Ind. R.R. Co.,* 353 U.S. 30, 40 (1957).[5] *See also Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.,* 373 U.S. 33, 38 (1963) (right to invoke arbitration procedure may not be defeated "by resort to some other forum.").

Thus, a carrier's claim for property damage based on its employee's negligence on the job constitutes a minor

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5. *See also* 67 Cong. Rec. 4670 (1926) ("In the settlement of minor disputes you will thus see that the employees and the managers are to settle their controversies among themselves."); 67 Cong. Rec. 4525 (1926) ("I am honestly of the belief that there is not a dispute of any character which may arise but what can be settled under the provisions of this bill, if it is enacted into law; and, besides, when such cases are adjusted harmony and good will between the employers and employees will be preserved. . . . The rancor, the disappointments and dissatisfactions which usually follow in the wake of forced action or compulsion in any form will be removed by the provisions of this bill . . . .") (testimony of Mr. Doak, quoted by Congressman Mapes).

dispute committed by the Railway Labor Act to the exclusive jurisdiction of the Arbitration Board. The identical conduct by the employee that at common law would give rise to a tort action also constitutes grounds for discipline or discharge. Literally hundreds of property damage incidents, most of a minor nature, occur each day in the railroad industry. Every day employees are disciplined for rule violations resulting in such property damage. Grievances concerning discipline or discharge based on such negligent conduct of an employee are plainly committed to the negotiation and arbitration procedures of the Railway Labor Act. "Each party to the dispute may submit it [to the Arbitration Board] for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation." *Elgin, supra,* at 727. Sustaining the action of the court of appeals "would invite races of diligence whenever a carrier or a union preferred one forum to the other. And if a carrier . . . could choose a court instead of the Board, the other party would be deprived of the privilege conferred by . . . the Railway Labor Act . . . which provides that after negotiations have failed 'either party' may refer the dispute to the appropriate division of the Adjustment Board." *Order of Ry. Conductors of America v. Southern Ry. Co.,* 339 U.S. 255, 256-57 (1950). Moreover, allowing the carrier to assert a property damage claim against its employee for negligence occurring in the employment relationship, either by separate action or by counterclaim in an employee's FELA action, would chill the exercise by employees of their right to assert the grievance and arbitration mechanisms provided by the Railway Labor Act. Employees would be coerced into accepting disciplinary sanctions out of fear that initiating a grievance to contest them would trigger a claim by the carrier for property damage.

Recognizing the availability of a common law negligence claim for property damage by the carrier against

its employee, as did the court of appeals, thus would frustrate the salutary purpose of the Railway Labor Act. The special nature of the railway industry and the historical context that served as the backdrop for the amendments to the Railway Labor Act "admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies." *Elgin, supra,* at 751 (Frankfurter J. dissenting). These problems "were certainly not expected to be solved by ill-adapted judicial interferences, escape from which was indeed one of the driving motives in establishing specialized machinery of mediation and arbitration." *Id.* at 752. *See also id.* at 758 ("It misconceives the legislation and mutilates its provisions to read into it common law notions for the settlement of private rights.")

The court of appeals, without discussing the Railway Labor Act and the many cases construing it, thus acted in conflict with controlling decisions of this Court and adopted a rule of law inconsistent with the dispute resolution mechanism of the Railway Labor Act, as well as with the statutory scheme of the FELA.[6] Certiorari should be

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6. Inasmuch as the FELA provides a federal statutory right to the employee to recover for his employer's negligence, the employee's FELA action is, of course, not subject to preemption by the subsequently enacted Railway Labor Act. *E.g., Jackson v. Consolidated R. Corp.*, 717 F.2d 1045, 1049-51 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984); *Hendley v. Central of Ga. R.R.*, 609 F.2d 1146 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981); *Barnes v. Public Belt R.R. Comm'n*, 101 F.Supp. 200, 203 (E.D. La. 1951); *cf. Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (wage claims based on Fair Labor Standards Act, 29 U.S.C. § 201 et seq., not barred by prior submission of grievances to contractual dispute resolution procedures); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitrator's resolution of contractual claim not dispositive of Title VII claim). Read together the FELA and the Railway Labor Act thus constitute a comprehensive and coherent statutory scheme which remits minor grievances, including tort actions founded upon the

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granted to consider these significant issues in the construction and operation of the comprehensive statutory scheme governing our nation's railroad industry.

## CONCLUSION

For all of the reasons set forth herein, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and should resolve these important issues of federal law.

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Footnote continued—

employment relationship, to the negotiation and arbitration process, with the exception of personal injury claims by employees based upon the negligence of the carrier, for which the FELA provides a special federal statutory remedy which takes into account any negligence on the part of the employee by reducing his award through a comparative negligence scheme. 45 U.S.C. § 53. With this exception, however, common law tort remedies are preempted, and may not be asserted either in separate actions or by counterclaim in an FELA action brought by the employee.

No. 83-1943



IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1983

ROBERT M. CAVANAUGH, and
MARTHA E. CAVANAUGH,

*Petitioners,*

v.

WESTERN MARYLAND RAILWAY COMPANY
AND BALTIMORE AND OHIO
RAILROAD COMPANY,

*Respondents.*

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Was the Fourth Circuit Court of Appeals correct in ruling that where a railroad employee negligently damages his employer's property, the railroad's state law property damage claim against the employee is not barred by the Federal Employers' Liability Act and can be asserted as a compulsory counterclaim in an F.E.L.A. suit filed by the employee arising out of the same transaction or occurrence as the property damage?

2. Should this Court deny the Petition for Certiorari to the Fourth Circuit Court of Appeals for the following reasons:

   a. The decision below gave full consideration to the issues and decided them correctly;

   b. The petitioner's arguments are without merit;

   c. The issues decided are not likely to recur often, and therefore are not of sufficient national importance to warrant review by this Court;

   d. The questions are not ripe for decision by this Court since the scarcity of lower court decisions deprives this Court of a thorough delineation of the issues in a sufficient variety of factual circumstances;

   e. The second question presented by Petitioners with regard to the propriety of a setoff was not raised or decided below; and

   f. There has been insufficient factual development in the trial court for this Court to determine which respondent is the employer, and therefore the matter should not be reviewed by this Court at this time.

## PARTIES

Petitioners have correctly described the parties.

A listing of parent and subsidiary corporations of respondents is given below.

(A) Western Maryland Railway Company

Parents — The Chesapeake and Ohio Railway Company (direct)
CSX Corporation (indirect)

Subsidiaries and affiliates (other than wholly-owned)

The Baltimore and Cumberland Valley Railroad Extension Company
Trailer Train Company

(B) Baltimore and Ohio Railway Company

Parents — The Chesapeake and Ohio Railway Company (direct)
CSX Corporation (indirect)

Subsidiaries and affiliates (other than wholly-owned)

The Akron and Barberton Belt Railroad Company
The Akron Union Passenger Depot Company
Allegheny and Western Railway Company
The Baltimore and Philadelphia Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
The Lakefront Dock and Railroad Terminal Company

The Monangahela Railway Company
Richmond-Washington Company
Richmond, Fredericksburg and Potomac Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company

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### OPINIONS IN THE COURTS BELOW

The Opinion of the Fourth Circuit Court of Appeals in this case is reported at 729 F.2d 289 (1984). The opinion of the District Court for the Northern District of West Virginia was not published. A transcript of that Court's verbal ruling and the orders entered by it appear in the appendix to the petition.

## STATEMENT OF THE CASE

Petitioners Robert M. Cavanaugh and Martha E. Cavanaugh filed a Complaint and an Amended Complaint in the United States District Court for the Northern District of West Virginia alleging, among other things, a right to recover under the Federal Employers' Liability Act, 45 U.S.C. §§51, *et seq.* (hereinafter "F.E.L.A.") against respondents Western Maryland Railway Company (hereinafter "Western Maryland") and Baltimore and Ohio Railroad Company (hereinafter "B&O"). This cause of action arose out of a February 12, 1980 head-on collision of two trains near Orleans Road, West Virginia. Petitioner Robert H. Cavanaugh was the engineer of one of the trains involved.

The petitioners alleged in their Complaint and Amended Complaint that Robert M. Cavanaugh was employed by the respondents, "or one of them, as a railroad engineer." In their answer to the Amended Complaint, the respondents admitted that Robert M. Cavanaugh was employed by respondents, *"or one of them,* as a railroad engineer." (emphasis added). No evidence has yet been presented in the District Court from which that Court could determine whether petitioner Robert Cavanaugh was an employee of Western Maryland, B&O, or both, and no such determination has yet been made by that Court.

The complaints allege that Robert Cavanaugh suffered severe personal injuries in the Orleans Road collision. The respondent railroads, as a result of the collision, sustained property damage in the approximate amount of $1,700,000.00, which included damage to diesel locomotive units, cars and trailers, track and related appurtenances, costs of rerailing cars and locomotives, and other related damages. The railroads filed a counterclaim against plaintiff Robert M. Cavanaugh in that amount on the ground that said collision and ensuing property damage were solely and proximately caused by the negligence, carelessness, and wanton and reckless misconduct of petitioner Robert M. Cavanaugh in his violation of railroad operating rules, his failure to obey an approach signal, his running of a stop signal, and other negligence.

The petitioners filed a motion to dismiss the railroads' counterclaim. By order dated June 16, 1982, this motion was granted by District Court Judge Robert E. Maxwell on the theory that the defendants' state law claim was barred by F.E.L.A. Also in that order, the Court certified, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there was no just reason for delay of entry of final judgment and directed the Clerk to enter a final appealable judgment dismissing the counterclaim. The final judgment order was appealed by the railroads to the Fourth Circuit Court of Appeals.

In an opinion written by Circuit Judge Donald Russell and joined in by Circuit Judge Robert F. Chapman, the Fourth Circuit reversed and held that nothing in F.E.L.A. proscribes the railroads' state law property damage counterclaim and also directed that the F.E.L.A. case and the counterclaim be tried separately. Circuit Judge K. K. Hall dissented.

The Circuit Court's opinion begins by recognizing the well established common law rule that an employer has a right of action against his employee for damage to the employer's property which was proximately caused by that employee's negligent acts. The opinion also notes that this right exists under West Virginia law as is demonstrated in *National Grange Mutual Insurance Co. v. Wyoming County Insurance Agency, Inc.*, 195 S.E.2d 151 (W.Va. 1973).

The Court also pointed out in a footnote that the issue of whether either or both of the railroads was the "employer" as that term is used in F.E.L.A. would have to be resolved by the District Court once all the facts which affect that determination are a part of the record. See at 729 F.2d at 290n.3.

The Circuit Court then analyzed the petitioners' assertions that this state law property damage claim is barred by either Section 5 or 10 of F.E.L.A. (45 U.S.C. §§55 and 60, respectively). Section 5 invalidates "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter." The Fourth Circuit, relying upon the text and the legislative history of this statute, correctly concluded that the railroad's property damage claim is obviously not the type of "device whatsoever" which the Congress intended to bar with this statute.

Section 10 of the Act, which was also relied upon by petitioners below, proscribes any "device" the "purpose, intent or effect" of which is to "prevent employees . . . from furnishing voluntarily information . . . as to the facts incident to the injury or death of any employee." In the words of the Circuit Court:

> As the language plainly indicates, this section was intended to prevent the railroad from making inaccessible to an injured employee other railroad employees whose testimony might be helpful to an injured employee if he chose to sue the railroad. 729 F.2d at 293.

The Court astutely described petitioners' contention that this straightforward statute should be stretched to bar the railroads' claim as follows:

> It would seem that the plaintiff is saying that all railroad employees who have any knowledge of an accident must be given immunity from liability lest they be prevented "from voluntarily furnishing information" in support of plaintiff's action by the threatened possibility that they too would be sued by the railroad for their responsibility in connection with the accident. We cannot believe that Congress had any such far-fetched purpose in enacting Section 10. 729 F.2d at 293.

Having disposed of petitioners' demand that Sections 5 and 10 of the Act be rewritten to bar the railroads' claims, the Circuit Court proceeded to an analysis of the very few cases on this issue, most of which are unpublished. The Court declined to follow a Washington state case relied upon by the petitioners, *Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 615 P.2d 457 (Wash. 1980). It relied instead upon *Kentucky & Indiana Terminal Railroad Co. v. Martin*, 437 S.W.2d 944 (Ky. 1969); *Capitola v. Minneapolis, St. Paul & Sault Ste. Marie Railroad Co.*, 103 N.W.2d 867 (Minn. 1960), and *Cook v. St. Louis-San Francisco Railway Co.*, 75 F.R.D. 619 (W.D. Okla. 1976), and on several unpublished decisions, which were cited to the Court pursuant to Rule 18(d) (iii) of the Fourth Circuit's local rules which provides that unpublished decisions may be cited

where they have great precedential value and where no published opinion would serve as well. The Court then rightly concluded that "In the contest of the precedents . . . the balance tilts sharply in favor of the allowability of the counterclaim herein. More important for us, though, reason and justice support that view." 729 F.2d at 294.

## SUMMARY OF ARGUMENT

The respondents submit that the Fourth Circuit Court of Appeals was clearly correct in its reading of the F.E.L.A. and that this Court need not review their decision. Respondents also submit that, in any event, granting certiorari in this case would be premature since there has been so little development in this area of law either in federal or state courts. Contrary to petitioners' fears that "thousands of railroad employees" will be affected, respondents believe this issue will seldom arise. However, should the question be litigated further in other cases in the future, this Court at that time will have a better basis for appraising the matter than is available at present. Furthermore, respondents point out that petitioners are not entitled to a review of the second issue presented in the petition, concerning setoff, because the issue was not raised, discussed, or decided below and, in any event, petitioners' contention on the point is wholly without merit. In sum, the Fourth Circuit Court of Appeals gave full and fair consideration to the issues presented below and decided them in a manner consistent with both applicable law and public policy. The petition for writ of certiorari thus should be denied.

## ARGUMENT

### I.

### THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT AND NEED NOT BE REVIEWED BY THIS COURT.

The rationale underlying the ruling of the Circuit Court is the simple but important idea that the law should provide a remedy to a party whose property has been damaged by another. The petitioners argue that this universally recognized foundation of tort law should be abrogated by this Court in situations where the party whose property was damaged is a railroad and where the tortfeasor is a railroad employee who has filed an F.E.L.A. suit alleging he was injured in the same incident which resulted in the property damage. Petitioners' claim is that the Federal Employers' Liability Act was intended to exculpate railroad employees who negligently damage their employer's property if they happen to be injured in the process. The Fourth Circuit quite properly rejected these contentions and found that the Act has no such intent or effect.

The common law has long recognized that an employer may sue an employee for tortious injury to its property. As the Circuit Court noted, this well accepted, though perhaps seldom used, rule is the law in West Virginia. *National Grange Mutual Insurance Co. v. Wyoming County Insurance Agency, Inc.*, 195 S.E.2d 151 (W.Va. 1973). The petitioners in the Court below attempted to distinguish the *National Grange* case on the ground that it involved a principal and agent rather than a master and servant. However, the Circuit Court recognized that this is a distinction without a difference. There is no reason to apply a different rule of tort liability to an employe who is labeled as an agent from that applied to an employee who is labeled a servant. It is nothing short of absurd to propose that West Virginia law requires agents to use due care in carrying out their duties to their principals but exempts servants from exercising due care in carrying out their duties to their masters.

The Court below also recognized that once the petitioner had filed a lawsuit arising out of the same collision which resulted in the railroads' property damage claim, the railroad was compelled to assert its claim in the same action, or else the claim would have been lost under the compulsory counterclaim provisions of Rule 13 of the Federal Rules of Civil Procedure:

> It follows that if the railroads in this case are denied the right to assert their claim against the plaintiff by way of a counterclaim, they could be denied any right of action ever to recover for the damages to their property suffered as a result exclusively of plaintiff's negligence and the plaintiff in turn could be given absolute immunity from any liability for his negligence both in this action and in any other action begun after judgment in the present action.
>
> It is difficult to believe that such an unfair result is compelled. 729 F.2d at 291.

Having established that the railroad had a valid state law claim which was compulsory under Rule 13, the Circuit Court then turned to an analysis of the petitioners' assertion that the claim was barred by the Federal Employers' Liability Act. In briefing and argument in the Circuit Court, the petitioners asserted that the railroads' state law counterclaim was barred by Sections 5 and 10 of the Act. (45 U.S.C. §§55 and 60, respectively). In the petition for writ of certiorari, the petitioners have proffered arguments based on other portions of the Act which were not raised below and have all but abandoned their reliance on Section 10.

This discussion will first focus on the petitioners' contentions with regard to Section 5. That statute voids contracts or other devices intended to release a carrier from F.E.L.A. liability. Petitioners' theory is that the counterclaim is a "device" designed by the railroad to exempt itself from liability in the petitioners' F.E.L.A. claim. In so doing, petitioners fail to apprehend the simple fact that the railroad's property damages are very real. They are not some fictional "device" malignly designed to deprive petitioner of anything. The railroads expect to be able to prove that as a direct result of wrongful conduct by petitioner, Robert

Cavanaugh, over $1,700,000.00 worth of locomotives, cars and trailers, track, and other items were damaged or destroyed. The railroads' demand for compensation for this damage is not a "device" barred by Section 5 but rather is a legal right which the Fourth Circuit quite properly protected.

The Court below understood that Section 5 was not intended to bar legitimate counterclaims but rather was obviously intended to prevent abuses such as fraudently procured releases, onerous employment contracts with waivers of F.E.L.A. remedies, and the like. This intention of Congress is clearly demonstrated in the legislative history of the statute. In the House of Representatives debate on the proposed Act, Representative Richard Wayne Parker dissented on the question of §55 as follows:

> It makes void all arrangements of settlement of such insurance as between employer and employee, and such systems, however much abused in the past are susceptible of great good and should be regulated rather than abolished. Cong. Rec. (1908) p. 4436 *et seq.*

This passage clearly reveals that Congress in passing §55 was concerned about specific alleged abuses in the settlement and insurance practices of the railroad industry. House Report No. 1386, set forth in Cong. Rec. (1908), p. 4436 *et seq.*, indicates that Congress meant the section to redress abusive employment contract provisions:

> Mr. Sterling. . .
>
> This provision is necessary in order to make effective Section 1 and 2 of the bill. Some of the railroads in the country insist on a contract with their employees discharging the company from liability for personal injuries.
>
> In any event, the employees of many of the common carriers of the country are today working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees. As an illustration, we quote one paragraph from a blank form of applica-

tion for a situation with the American Express Company, and entitled "Rules Governing Employment by This Company":

> I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents, or employees, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury or connected therewith or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators, with the payment of said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claims or in defending the same, including all counsel fees and expenses of litigation connected therewith.

This extract from the legislative history clearly demonstrates that the evil which Congress was attempting to redress in this section was various devices, such as language in applications for employment which acted as waivers or limitations on the employee's right to sue the railroad. It was in no way aimed at legitimate property damage claims of railroads against negligent employees.

Searching the Act for another means by which they could escape liability for the tortious destruction of respondent's property by Robert Cavanaugh, petitioners in their argument below also relied heavily upon Section 10 of the Act (45 U.S.C. §60). The text of the section quite clearly demonstrates that it was intended to prohibit railroads from trying to prevent employees from giving truthful evidence about accidents:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports. 45 U.S.C. §60.

The Fourth Circuit recognized that petitioners' arguments on Section 10 amounted to an assertion that if railroad workers are not given complete immunity from liability for their torts, they will refuse to give truthful testimony in investigation of accidents. The Fourth Circuit quite correctly held that this was not the purpose of the statute.

Perhaps because the Fourth Circuit recognized the fallacies inherent in the arguments based on Sections 5 and 10 of F.E.L.A., the petitioners herein now assert that the counterclaim violates other sections of the statute which were not raised below.

Petitioners now rely on Section 3 of F.E.L.A. (45 U.S.C. §53). They repeatedly assert that under Section 3, it is improper to "reduce" a plaintiff's recovery for his injuries except by the percentage of his own negligence, and not even that if the railroad has violated a safety statute. This is, of course, true, but it ignores the fact that the railroad's claim is not a "reduction" of plaintiff's award but rather a separate claim for separate — but very real — damages arising out of a separate body of law, and for which the railroad is entitled to a remedy, just like any other

litigant. The petitioners apparently believe that the railroads' legitimate property damage claim must be barred because if a jury grants an award on both the petitioners' F.E.L.A. claim and on the counterclaim, the petitioners will end up with less money in their pockets than they would have had if the property damage claim was barred. The absurdity of petitioners' position can be seen when one realizes that this same logic would also bar a countersuit by the employing railroad against its employee on a promissory note or other contract, or even would prohibit a civil action for conversion if the employee had stolen railroad property. If petitioners' reasoning is applied, such claims, like the counterclaim for property damage herein, would operate to "reduce" an F.E.L.A. recovery in violation of Section 3. This is obviously not a proper interpretation of the Act.

Petitioners also contend that if the Fourth Circuit is not reversed, national uniformity in the litigation of F.E.L.A. claims will be impaired because state laws on contributory or comparative negligence vary. Again, petitioners fail to understand that the employee's right to litigate his F.E.L.A. claim for personal injuries is not affected by the decision below. It is only the *employer's* right to litigate its state law claim for property damage which was dealt with and upheld by the Fourth Circuit.

Petitioners also now rely upon a fourth portion of F.E.L.A., Section 6 (45 U.S.C. §56) which permits F.E.L.A. plaintiffs three years in which to file their actions and which allows them to sue in either federal or state court. The petitioners argue that the ruling below will impermissibly undermine this statute by allowing the railroads to file suit first in their own choice of forum long before the running of the limitations period. This argument presumes that Rule 13(a) would supersede Section 6 of the Act and make the F.E.L.A. claim a compulsory counterclaim in a property damage suit initiated by the railroad. Obviously, this is not the case, since it is well established that the federal rules are procedural only and cannot alter substantive rights. 28 U.S.C. §2072. The Courts thus can protect a F.E.L.A. plaintiff's Section 6 rights simply by holding that the statute prevails over the rule and that the F.E.L.A. claim would not be a compulsory counterclaim in a property damage action brought by a railroad.

In fact, one federal district court has already correctly resolved a similar problem, *Cook v. St. Louis-San Francisco Railway Co.*, 75 F.R.D. 619 (W.D. Okla. 1976). The *Cook* case involved a head-on collision of two trains which the railroad believed was caused by the negligence of two employees, both of whom were injured. One employee filed an F.E.L.A. suit in federal court, and one filed his suit in state court. When the railroad counterclaimed for property damage in the federal court proceeding, the right to counterclaim was upheld. However, when the railroad moved to join the employee who filed his F.E.L.A. action in state court as a defendant on the counterclaim in the federal court action, the district court refused to permit the joinder. The rationale of the district court was that the railroad would not be prejudiced by litigating its property damage counterclaim against the state court F.E.L.A. plaintiff in the forum chosen by that F.E.L.A. plaintiff pursuant to his rights under Section 6. This case illustrates that the Courts can and will protect F.E.L.A. plaintiffs' right to choice of forum and time of suit. Therefore, the petitioners' fears that Section 6 will be undermined by the decision of the Circuit Court are groundless.

In addition to these arguments based on various sections of F.E.L.A., petitioners also take issue with the Fourth Circuit's decision that the balance of precedents weighs in favor of respondents. Petitioners count one published and one unpublished opinion to their credit [*Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 615 P.2d 457 (Wash. 1980) and *Shields v. Consolidated Rail Corp.*, No. 81 Civ. 4204 (S.D.N.Y. 1981)] and disparage the three published and two unpublished opinions against them [*Capitola v. Minneapolis, St. Paul, & Sault Ste. Marie Railroad Co.*, 103 N.W.2d 867 (Minn. 1960), *Kentucky & Indiana Terminal Railroad Co. v. Martin*, 437 S.W.2d 944 (Ky. 1969), *Cook v. St. Louis-San Francisco Railway Co.*, 75 F.R.D. 619 (W.D.Okla. 1976); *Consolidated Rail Corp. v. Dobin*, No. 81-2539 (E.D.Pa. 1981) and *Key v. Kentucky & Indiana Terminal Railroad Co.*, No. C78-0313-L(A) (W.D.Ky. 1979)] as containing insufficient discussion of the issue. Perhaps the most striking conclusion which can be drawn from these seven cases found by the parties is that this issue is apparently *very rarely litigated.* This constitutes one important reason why the petition should be denied, both because there has been insufficient development

of the question by the lower courts for this Court to study and because the scarcity of cases indicates the matter is simply not of sufficient national importance to merit review by this Court.

In addition, a brief review of the decisions permitting the prosecution of a property damage counterclaim in an F.E.L.A. action demonstrates clearly the dubiousness of petitioners' predictions of dire calamities flowing from the holding of the Circuit Court. There are two published state court decisions in which the Courts permitted the counterclaims to be heard and the railroads did not recover because of their own contributory negligence: *Capitola v. Minneapolis, St. Paul & Sault Ste. Marie Railroad Co., (supra)* and *Kentucky & Indiana Terminal Railroad Co. v. Martin, (supra).* These cases were decided in jurisdictions where contributory negligence is a complete bar. Petitioners apparently fear that the availability of a property damage counterclaim will affect numerous F.E.L.A. plaintiffs. Respondents submit that this is unlikely. In strict contributory negligence jurisdictions, as in the cited cases, the railroad's claim will be completely barred if it was negligent at all, and the railroad will only recover in situations where the accident was solely due to the plaintiff's own negligence. In such cases, the plaintiff has no valid F.E.L.A. claim anyway. In pure comparative negligence jurisdictions, a railroad's property damage claims will still be reduced by its proportion of fault. And in states with modified comparative negligence, such as West Virginia, the property damage claim may be barred altogether if the railroad is substantially at fault. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W.Va. 1979).

When one subtracts from the totality of all F.E.L.A. cases: (1) that large proportion where no property damage occurred, (2) that proportion where even if property damage did occur the injured employee was not negligent or did not cause the accident,and (3) that proportion where any property damage claim is barred or severely reduced by the railroad's own negligence, the respondents believe that only a very few cases will remain. And those few cases will be the ones where the employee's negligence was so gross and the railroad's conduct so free from fault that public policy would demand that the employee bear the losses he caused.

The third published case relied upon by the Fourth Circuit is *Cook v. St. Louis-San Francisco Railway Co., (supra).* As is noted above, the *Cook* decision illustrates, among other things, that a Court can uphold a railroad's right to sue for property damage and still protect an injured employee's right to choose his forum.

The respondents also cited three unpublished decisions to the Fourth Circuit: *Van Cleve v. Consolidated Rail Corporation,* No. 79 CV-01-93 (Ohio 1979);[1] *Key v. Kentucky & Indiana Terminal Railroad Co., (supra);* and *Consolidated Rail Corp. v. Dobin, (supra).* Interestingly, like the case at bar, all three of these cases involved collisions between two trains. Of the three, the opinion of District Judge J. William Ditter, Jr. of the Eastern District of Pennsylvania in the *Dobin* case is perhaps the most helpful. In the *Dobin* case, an engineman and conductor were in the cab of a locomotive which ran into the rear of a stopped freight train, killing both men. Based upon the facts disclosed in the National Transportation Safety Board Report, it appeared that the conductor may have been under the influence of marijuana and actually operating the train at the time. In the F.E.L.A. action which arose from these deaths, the railroad filed a counterclaim against the conductor's estate for damage to railroad property. This was dismissed without prejudice, and another action was filed against the conductor's estate and was assigned as a related case to the judge handling the F.E.L.A. action. The conductor's estate filed a motion to dismiss the railroad's counterclaim as contrary to the provisions of F.E.L.A. By an order filed September 29, 1981, District Judge J. William Ditter, Jr. denied the motion to dismiss. He held as follows:

> There is a common law right of action by a master against its servant "for property damage arising out of ordinary acts of negligence committed within the scope of employment." *Stack v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 94 Wash. 2d 155, 615 P.2d 457, 459 (1980); *Greenleaf v. Huntingdon & B.T.M.R. & Coal Co.*, 3 F.R.D. 24, 25 (E.D.Pa., 1942).

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[1] *Van Cleve* was not cited by the Fourth Circuit and was conveniently omitted from the Petition. The order in that case is appended hereto.

> The Federal Employers' Liability Act (F.E.L.A.) 45 U.S.C. §51 et seq., sets forth the grounds under which a railroad employee may recover from its employer for personal injury incurred while working. The provisions of the FELA do not abrogate the railroad's common law right against its employees for property damage caused by their negligence.
>
> I decline to adopt the reasoning of *Stack*, that a suit by a railroad against its employee for property damage is a "device whatsoever" either designed to relieve the railroad of liability or to prevent other employees from furnishing voluntary information regarding the facts incident to the injury or death of the defendant employee. *Stack, supra,* at 459-61. See 45 U.S.C. §§55 & 60 (1972). *See also Kentucky & Indiana Terminal R.R. Co. v. Martin,* 437 S.W.2d 944 (Ky.) (1969) (bifurcated approach adopted in trial of employee FELA claim and railroad counterclaim for property damage).

Petitioners urge that because the Supreme Court of Washington's decision conflicts with that of the Fourth Circuit in this case, this Court must grant certiorari to resolve the conflict. Respondents submit that because federal court decisions interpreting the Federal Employers' Liability Act control over state court decisions, there is no actual conflict. *Bowman v. Illinois Central Railroad Co.,* 142 N.E.2d 104 (Ill. 1957), cert. den. 355 U.S. 837; and *State ex rel Burlington Northern Inc. v. District Court of the Eighth Judicial District,* 548 P.2d 1390 (Mont. 1976). The decision of the Fourth Circuit Court of Appeals is now the ruling law on this point, and no further guidance from this Court is necessary unless and until another federal Circuit Court of Appeals disagrees with the decision below.

One final point raised by petitioners needs to be addressed. Petitioners conceded that the drafters of F.E.L.A. may never have

considered the issue presented herein (an odd assertion since they also argue that four sections of the Act apply). (Petition, p.15) They then contend that even so, this Court should read a prohibition of respondents' claim into the Act, regardless of Congressional intent. Respondents submit that while F.E.L.A. was meant to be construed liberally by the courts, it is not the province of the judiciary to deny respondents their legitimate state law rights on so flimsy a basis. As Judge Russell put it in the opinion below:

> The plaintiff, however, finds lurking obscurely in the language of Sections 5 and 10 a legislative purpose to interdict counterclaims by defending railroads in FELA suits because the filing of such counterclaims will unfairly coerce or intimidate the injured employee from filing and pursuing his FELA action. As we have already observed, there is nothing in the language of the Act or its legislative history that supports this reasoning. More than that, there is no authority for an assumption that the possibility of a counterclaim being filed creates an unfair advantage in favor of the defendant or improperly coerces or intimidates the injured party from seeking redress for his injuries. Certainly Congress, in the course of enacting FELA never expressed any interest in denying to the defendant railroad the right of counterclaim because of any assumed prejudice thereby caused to the plaintiff in an FELA action and we do not think we should try almost eighty years after the FELA was originally enacted to read a prohibition of a counterclaim by the defending railroad into Sections 5 or 10 on some fanciful notion that the maintenance of the counterclaim will prevent or prejudice the injured railroad employee in securing a fair award at the hands of the jury. The same argument could be advanced against the admissibility of a counterclaim in any tort action.
>
> 729 F.2d at 293-294.

Respondents submit that this resolution of the question by Judge Russell is so clearly correct that there is no reason for this Court to consider the issue further.

## II.

## THERE HAS BEEN INSUFFICIENT FACTUAL DEVELOPMENT BELOW FOR THIS MATTER TO BE RIPE FOR FURTHER REVIEW.

Even assuming solely for the purposes of argument that the Circuit Court erred, and F.E.L.A. can be somehow construed to bar a property damage counterclaim in a F.E.L.A. action, the counterclaims still could not be properly dismissed prior to a factual determination as to who was the employer, and therefore the matter is not mature for review by this Court.

As is noted in the Statement of Case, the pleadings indicate that neither the petitioners nor the respondents have been able to resolve the question of whether the petitioner Robert M. Cavanaugh was, for purposes of F.E.L.A., employed by the B&O, by Western Maryland, or by both on the day of the accident. In order for the Federal Employers' Liability Act to apply to a case, the F.E.L.A. plaintiff must establish that he was "employed" by the defendant railroad at the time of his injury. (45 U.S.C. §51). In "borrowed servant" cases, the determination of who is the "employer" is often a complex one. As the Court held in *Stevenson v. Lake Terminal Railroad Co.* 42 F.2d 357 (6th Cir., 1930):

> The Congressional failure to define the term "employee" in either the Safety Appliance Acts (45 USCA §1 et seq.) or the Federal Employers' Liability Act (45 USCA §§61-59) has evoked a large amount of litigation . . . . It is, however, settled that, if the injured person was not in the employ of the defendant, the action fails . . . .And the Supreme Court has held that the term "employee" in the Employers' Liability Act describes the conventional relation of master and servant . . . .This relation is usually dependent upon the right to direct the manner in which the work should be done . . . or, stated differently, its existence is determined by ascertaining whose work was being performed at the time of the injury . . . .Selection and engagement, payment of wages, and the power of dismissal are relevant but not conclusive; direction and control of the work being done usually are determinative. . . . 42 F.2d at 358-359 (Citations omitted).

Clearly the question of who is the employer in this case depends on a variety of facts and circumstances which are not yet a part of the record. It is therefore apparent that this question will have to be resolved by the District Court as a matter of law, once the relevant facts have been admitted into evidence.

Because of its decision that F.E.L.A. does not bar the counterclaim, the Circuit Court was not required to confront this problem. See 729 F.2d at 290n.2. However should this Court grant certiorari, it would inevitably be enmeshed in trying to hypothesize about what the evidence may show as to who is the employer since obviously a non-employing railroad should not be barred from asserting a property damage counterclaim against a person who has tortiously damaged its property. The Federal Employers' Liability Act applies only when there is an employer/employee relationship between the plaintiff and the defendant. As was held in *Kentucky & Tennessee Railway Co. v. Minton,* 180 S.W. 831 (Ky. 1915):

> By the express terms of the Employers' Liability Act, the carrier is liable to its employees only, for negligence resulting in their injury. The Courts have no power to extend its liability under the statute to one not its servant, he being a stranger to it. . . . It was certainly the intention of Congress, enacting the statute, *supra,* to limit the beneficiaries thereunder to those only sustaining the relationship of servant to the master. 180 S.W. at 835.

Under the case law, then, the provisions of the Federal Employers' Liability Act can have no applicability to a railroad who is not the employer of the F.E.L.A. plaintiff. If, as seems likely, it is determined in this case that one of the respondent railroads is not the employer of Robert Cavanaugh for purposes of F.E.L.A., that railroad clearly has the right to assert a state law claim against the petitioner Robert M. Cavanaugh for any damage to its property which is found to have resulted from his tortious conduct. Additionally, it should be noted that if the petitioner is held to have been the sole cause of the accident, he is barred from a recovery under F.E.L.A., and even the employing railroad would clearly have a right to proceed on its property damage claim. The presence of these factors clearly militates against granting certiorari at this stage of the instant case.

## III.

**THE SECOND QUESTION PRESENTED BY PETITIONERS RAISES ISSUES WHICH WERE NOT BRIEFED, ARGUED, OR DECIDED BELOW, AND THEREFORE THE MATTER SHOULD NOT BE CONSIDERED BY THIS COURT TO BE AN APPROPRIATE SUBJECT FOR REVIEW.**

The petition phrases the second "Question Presented" as follows:

> Whether the Federal Employers' Liability Act prohibits a railroad from satisfying any judgment it receives in a negligence action against an injured employee from that employee's F.E.L.A. award.

It must first be noted that this question is not properly before this Court because it was not raised or decided below. The decisions of this Court clearly indicate that this Court sits to review decisions of lower courts and will not decide questions not raised or resolved below absent extraordinary circumstances. *Duignan v. United States,* 274 U.S. 195 (1927); *California v. Taylor* 353 U.S. 553 (1957); *Lawn v. United States,* 355 U.S. 339 (1957); *Youakin v. Miller,* 425 U.S. 231 (1976); and others. No such extraordinary circumstances are present in this case. Nothing prevented the petitioners from raising and developing the issue below, and no constitutional or other substantial rights of petitioners will be prejudiced by the refusal of this Court to consider the matter. And, in any event, petitioners' contentions on this point are without merit.

It is unclear from the petition whether petitioners are asking simply for a ruling that the District Court may not order an award on the counterclaim to be set off against an award on the F.E.L.A. claim or whether the petitioners are requesting a more drastic and extraordinary ruling. Some of the language in the petition seems to demand a holding that the railroad could not pursue its state law post-judgment remedies of attachment, execution, garnishment, etc. against any portion of the F.E.L.A. award or any property purchased therewith. If petitioners are requesting

only a holding that the District Court may not order a setoff, it would seem that the chief result of such a ruling would be to make collection of the property damage award more cumbersome without providing petitioners with any real protection against collection. If the petitioners are requesting a much more drastic and wholly unprecedented ruling to the effect that the award is entirely insulated from any state law procedures for collecting on judgments, such a rule would be a nightmare to practically apply and would also constitute a massive interference with state law procedures which is entirely unwarranted. If petitioners are seriously contending that the award should be entirely insulated, the practical problems are legion. Presumably, the property damage award could be collected from property held by the petitioners prior to the action. Respondents can envision no practical procedure by which they would be able to distinguish which property of their debtor they would be permitted to levy against and which they would not. This problem demonstrates both that the petitioners' contention is without merit and that it has been insufficiently developed as a theory to justify this Court in taking its time to consider it.

In support of this extraordinary contention, petitioners cite only the case of *Baker v. Gold Seal Liquors,* 417 U.S. 467 (1974) which is not even remotely on point. *Baker* is not an F.E.L.A. case at all. It is a bankruptcy case which creates a very limited exception to the general bankruptcy rule permitting a creditor to set off claims he has against the bankruptcy debtor against any claim which the trustee may assert against him. This exception is made in *Baker* for a reorganization of a railroad because of the public interest in the survival of the carrier. The effect of the ruling was not to completely bar the creditor's claim from being collected from the bankrupt railroad's assets, but rather to give the creditor's claim a different priority. There is nothing in *Baker* which even hints that F.E.L.A. should be construed to bar a setoff in this case.

Petitioners also assert that because Section 5 of the Act (45 U.S.C. §55) allows a setoff of insurance premiums paid by a railroad that "no other setoff is permitted by the statute." (Petition p. 23). This is a misrepresentation of the language of the section. The statute does not mention any other setoff, but contains nothing to bar such.

Respondents submit that neither the *Baker* case nor the text of the Act give any support at all for petitioners' extraordinary proposal. This Court should not grant certiorari to review this matter.

## CONCLUSION

It is apparent that for a number of reasons this matter does not merit the granting of a writ of certiorari. The Fourth Circuit Court of Appeals carefully evaluated the issues before it and has rendered a decision which is in conformity with the legislative history of the Federal Employers' Liability Act, with the mainstream of judicial thought on the issue, and with public policy. This is apparently a very rarely litigated issue, which is not likely to occur in a sufficient number of cases to merit this Court's attention. Furthermore, because of the limited factual development below, if the Court were to grant review, remand for the taking of additional evidence would almost certainly be necessary. And finally, the petitioners' second argument is not properly before this Court because the issue was not raised or decided upon below, and in any event their contentions on the point are without merit. For all of these reasons, the petition for writ of certiorari to the Fourth Circuit Court of Appeals should be denied.

Respectfully submitted,

WESTERN MARYLAND RAILWAY COMPANY and BALTIMORE AND OHIO RAILROAD COMPANY,

By _____
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## APPENDIX A

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

| | | |
|---|---|---|
| Robert Van Cleve | : | |
| Plaintiff | : | |
| vs. | : | Case No. 79CV-01-93 |
| Consolidated Rail Corporation | : | |
| Defendant | : | |

DECISION ON MOTION TO DISMISS COUNTERCLAIM

Rendered this 26th day of July, 1979.

GILLIE, J.

There is no language in any part of the Federal Employers' Liability Act which by expression or implication relates to or in any way concerns itself with the right or lack thereof of an employer to press a claim against an employee for alleged negligence of the employee. The Federal Employers' Liability is directed entirely to an enlightened and modified re-statement of the age-old case-drawn principles of master-servant common law, as that law touches upon an employee's right to recover for injuries caused by an employer's negligence.

Plaintiff argues further, and separately from his assertion that the Federal Employers' Liability Act applies, that by the interaction of the Federal Employers' Liability Act with Ohio Common law in the event both are applied appropriately, defendant could not recover from plaintiff in any finding possible to the Court. While this may be true, the Court finds thereby no reason why defendant may not pursue its counterclaim.

Plaintiff's motion to dismiss defendant's counterclaim is overruled.

/s/ William T. Gillie

William T. Gillie, Judge

## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that served the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by mailing true copies thereof by depositing the same in the United States mail, postage prepaid, at Huntington, West Virginia, on the 29th day of June, 1984, to:

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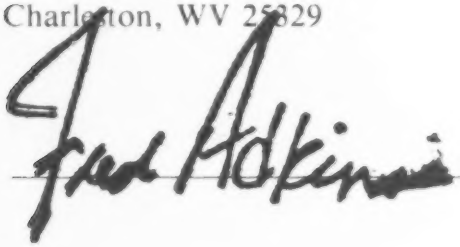

No. 83-1943

IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1983

ROBERT M. CAVANAUGH, and
MARTHA E. CAVANAUGH,

*Petitioners,*

v.

WESTERN MARYLAND RAILWAY COMPANY
AND BALTIMORE AND OHIO
RAILROAD COMPANY,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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## IN THE
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v.

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AND BALTIMORE AND OHIO
RAILROAD COMPANY,

*Respondents.*

## RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

### SUMMARY OF ARGUMENT

This Court should deny the Motion for Leave to File Brief *Amicus Curiae* which was filed herein by the United Transportation Union (Union). It is the position of the respondents, Western Maryland Railway Company and Baltimore and Ohio Railroad Company[1] that the Motion should be denied upon the following grounds:

[1]A list of the parent companies, subsidiaries, and affiliates of the respondent railroads may be found in the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit which was previously filed herein.

(a) The first portion of the proposed brief merely restates the arguments set forth in the Petition for Certiorari and therefore will add nothing to this Court's understanding of this case; and

(b) The pre-emption issue presented in the second section of the proposed brief was neither raised nor decided below, and in any event, the movant's argument on that issue is without merit.

## ARGUMENT

Section I of the proposed brief *amicus curiae* merely rehashes the arguments set forth in the Petition for Certiorari. There is no new argument or precedent advanced therein which is not set forth either in the Petition or in the dissent filed in the Court below. Because the arguments set forth in Section I have already been addressed in the respondents' Brief in Opposition to the Petition for Writ of Certiorari, the respondents will not discuss the matters set forth in Section I further except to point out that duplicative argument advanced by a proposed *amicus curiae* can be of little help to this Court in deciding whether to grant certiorari in this case.

The Union has advanced in Section II of the proposed brief an argument which was not raised or decided either by the District Court or the Fourth Circuit Court of Appeals. Section II asserts, for the first time, that the railroads' state law property damage claim against petitioner Robert Cavanaugh, which was upheld by the Fourth Circuit, is pre-empted by the Railway Labor Act. 45 U.S.C. §151, *et seq.* It has often been held that this Court sits to review decisions of the lower Courts and will not decide questions not raised or resolved below, absent extraordinary circumstances. *Youakim v. Miller*, 425 U.S. 231 (1976); *California v. Taylor*, 353 U.S. 553 (1957); *Lawn v. United States*, 355 U.S. 339 (1957); *Duignan v. United States*, 274 U.S. 195 (1927); and others. No such extraordinary circumstances are present in this case. Nothing prevented the petitioners from raising and developing the pre-emption issue below, and no constitutional or other substantial rights of petitioners will be prejudiced by the refusal of this Court to consider the matter. For this reason alone, this Court should refuse to grant the motion for leave to file the *Amicus Curiae* brief.

A second, and more important, reason for denying the motion is that the pre-emption argument advanced by the Union cannot be supported. In its proposed brief, the Union takes the position that the railroads' state law property damage counterclaim is a "minor dispute" as that term is used in cases decided under the Railway Labor Act (R.L.A.). 45 U.S.C. §151 *et seq*. The Union correctly points out that the grievance and arbitration procedure provided by the Railway Labor Act is the exclusive mechanism for resolving minor disputes between employers and employees in the railway industry. (Proposed Brief, p. 16). The respondent railroads concede that *if* the Union were correct in its characterization of the property damage claim as a "minor dispute," that claim could not be litigated as a counterclaim to the petitioners' Federal Employers' Liability Act suit now pending in the Federal District Court for the Northern District of West Virginia. Rather, minor disputes must be litigated through the grievance and arbitration procedure and are ultimately within the exclusive jurisdiction of the National Railroad Adjustment Board. However, the Union has cited no case holding that such a state law property damage claim filed by an employer against a negligent employee is a minor dispute. Furthermore, examination of the Act itself and of the applicable case law yields the inescapable conclusion that the railroads' state law property damage claim cannot be considered to be a minor dispute and thus is not pre-empted by R.L.A.

The Union's argument centers chiefly around the leading case of *Elgin, Joliet & Eastern Railway Co. v. Burley*, 326 U.S. 711 (1945). *Elgin* is the landmark case interpreting the dispute resolution mechanisms of the Railway Labor Act. In a much cited passage, the *Elgin* case explains the difference between major disputes and minor disputes:

> The statute first marks the distinction in §2, which states as among the Act's five general purposes: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all *disputes growing out of grievances or*

*out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."* The two sorts of dispute are sharply distinguished, though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.

The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation *or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement,* e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future. (emphasis added). 325 U.S. at 722-723.

The Union concedes that the property damage claim asserted by the railroads in this case is not a major dispute but rather claims instead that it is a minor dispute. The Union also concedes that the claim in question does not involve the meaning or proper application of a provision of the applicable collective bargaining agreement. Rather, the Union contends that the claim at issue

herein falls within the "omitted case" category. The Union cites no case interpreting the phrase "omitted case." It relies instead on the contention that the claim herein is "founded upon some incident of the employment relation" as that phrase is used in *Elgin*. 325 U.S. at 723. Plainly, this contention will not hold up under close scrutiny.

To understand the meaning of the reference to omitted cases in *Elgin*, it is necessary to remember that the focus of the opinion was upon distinguishing major disputes from minor disputes and not on distinguishing claims within the Act from claims outside the sphere of the Act. Taken literally, the language in *Elgin* seems to mean that a minor dispute is anything covered by the collective bargaining agreement *or* anything *not* covered by the collective bargaining agreement. It is obvious that this construction is nonsensical. The Court in *Elgin* cannot have meant that any controversy either arising from a collective bargaining contract or omitted from it is pre-empted by R.L.A. since that would necessarily encompass every dispute in the universe of legal controversy. A more logical explanation for the inclusion of the phrase "omitted case" within the definition of minor disputes in *Elgin* is that certain matters, particularly disputes over past practices or over the scope of residual managerial prerogative, by their nature are matters that may not be covered by specific language in the agreement. An examination of the case law on this point clearly demonstrates that a proper construction of the phrase "omitted case" is that it refers to matters, such as disputes over past practices, which are very similar to disputes commonly arising out of the language of collective bargaining agreements but which, for one reason or another have been omitted from the particular contract in issue.

For example, in *Airline Flight Attendants v. Texas International Airlines, Inc.*, 411 F. Supp. 954 (S.D.Tex. 1976), the airlines began unilaterally cancelling and deleting certain flights and rerouting others. The flight attendants sought injunctive relief which the Court held could only be granted if the dispute were major. To resolve the issue, the Court examined the language quoted from the *Elgin* case:

> From this definition two types of minor disputes can be distinguished. The first type of minor dispute relates

> to the meaning or proper application of a particular provision of an existing collective agreement with reference to a specific situation. The second type of minor dispute involves differences arising incidentally in the course of employment. Not being covered by any express provision of the collective agreement, differences of this type are called "omitted cases." 411 F. Supp. at 959.

The Court then found that the dispute concerning cancelling and rerouting flights was arguably covered by the express provisions of the contract. However, the Court also held in the alternative that even if the dispute was not covered by express provisions of the agreement, it was "an 'omitted case' concerning a dispute that had arisen incidentally in the course of employment and that merely involved the scope of managerial prerogative impliedly left with the Airlines by the collective agreement." 411 F. Supp. at 961.

In the case at bar, the railroads' state law property damage claim cannot be said to be *incidental* to Cavanaugh's employment relationship. If a total stranger to either railroad had negligently damaged railroad property, as Cavanaugh did, there could be no argument that the claim was pre-empted. The fact that Cavanaugh may have been an employee of one or both of the railroads at the time he committed the tort does not make the railroads' chose in action an *incident* of the contractual relationship between Cavanaugh and his employer. Unlike the claim of the flight attendants in the *Texas International* case, the railroads' claim here is not a dispute over working conditions or any other incident of the employment relationship. Therefore it is not a minor dispute and is not pre-empted.

Similarly, in *Portland Terminal Railroad Company v. United Transportation Union,* 97 Lab. Cas. (CCH) §10,259 at 18,288 (D.C.Or. 1982), the issue also concerned whether a dispute was pre-empted under the "omitted case" doctrine. In *Portland,* the Union objected to a new company policy which permitted the company's parent and another railroad to pass through the company's yard using the parent's own switching crews, thus bypassing the daughter company's crews. In *Portland,* the Court affirmed a special

master's opinion that the question was a minor dispute within the omitted case classification used in *Elgin*. The opinion quotes some very interesting testimony given by an official of the company as being crucial to the resolution of the case:

Q. [Court]: This dispute on this interchange business, this dispute in one sense of the word kind of falls between the cracks of these various agreements, doesn't it?

A. [Manager]: Yes.

Q. [Court]: It's the kind of thing that when you folks sat down, you and the folks from the union sat down in 1972 and did your arm wrestling and whatever else you do when you negotiate, it was an area that you didn't put a specific section or clause or phrase about?

A. [Manager]: I don't quite follow what you mean.

Q. (Court): Well, this isn't covered in specific terms in any of your documents?

A. [Manager]: You are talking about the new inaugurated yard-to-yard? No, it is not, Your Honor.

Q. [Court]: And what it comes down to, of course, is that you folks — that is the railroad says, well, it's not prohibited. And what the union folks are saying is, it's not mentioned, and therefore, it's not permitted. That is where you really start to focus on this issue?

A. [Manager]: Right.

Q. [Court]: It's the kind of thing where if you had thought about it, you and the union would have negotiated it?

A. [Manager]: Undoubtedly.

97 Lab. Cas. (CCH) at 18,292.

This testimony, which was so helpful in determining that the dispute in *Portland* was pre-empted as a minor dispute of the omitted case type provides a good contrast to the claim at issue in this case. The respondent railroads' property damage claim is *not* the type of matter which would have been negotiated in the labor agreement if the parties had thought about it. It is *not* a matter which simply "fell through the cracks." It is *not* an issue concerning past practice or residual management prerogative. Rather, it is an entirely separate chose in action arising from state tort law and not an incident of the petitioner's employment relationship. It was not negotiated, nor is it an item that would have been negotiated because it already existed as a creature of law.

In addition to these cases defining the "omitted case" classification of *Elgin,* it is also helpful to examine the text of the Railway Labor Act itself to determine what matters it was intended to cover. Perusal of the statute reveals that the phrase "rates of pay, rules, or working conditions" is used time and again to describe the statute's central concerns. For example, 45 U.S.C. §151(a) states that a general purpose of the act is "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." The fact that the railroads' state law property damage claim has no connection whatsoever with "rates of pay, rules, or working conditions" is additional evidence that this claim is not the type of dispute which was intended to be covered by the act.

It is also important to note that nothing in our national labor policy requires pre-emption of the railroads' state law claim. That policy favors pre-emption of state law causes of action which are so closely tied to the employment relationship (e.g., disputes over rates of pay, rules, or working conditions) that they are more properly litigated before the National Labor Adjustment Board which has special expertise in such matters. The claim at issue herein, a state law remedy for negligent injury to personalty, is not within that special expertise. Rather, it is the type of issue that is within the special expertise of the courts.

Being unable to cite a single opinion holding a state law property damage action to be a minor dispute within the "omitted case" classification, the Union resorts to citing a number of cases in which

courts have rejected *employees'* attempts to recast their grievances against their employers as state law tort claims in an effort to avoid the pre-emption effect of the Railway Labor Act. (See Proposed Brief, pp. 17-18). Close examination of each of these cases, however, indicates that in each case, the alleged state law tort or contract claim was actually inextricably intertwined with the employment relationship, not just the result of an act or omission which happened to occur during employment. It is also clear that in each case, the court attempting to decide the claim would have necessarily become involved in interpreting and applying the collective bargaining agreement. These factors simply are not present in this case; hence the cases cited are inapposite.

For example, the Union cites *Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320 (1972) which involved an employee's claim that he was wrongfully discharged. The Court in *Andrews* noted that the very concept of "wrongful discharge" implied a breach of the employee's collective bargaining agreement. 406 U.S. at 324. It is hard to imagine any dispute more closely tied to an employment relationship and to contractual grievance procedures than a controversy over a termination of the relationship. Of the cases cited by the Union, *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983); *Choate v. Louisville & Nashville Railroad Co.,* 715 F. 2d 369 (7th Cir. 1983); *Magnuson v. Burlington Northern Inc.,* 576 F.2d 1367 (9th Cir. 1978) and *Sharkey v. Penn Central Transportation Co.,* 493 F.2d 685 (2nd Cir. 1974) all involved discharges. These cases stand for the proposition that disputes by employees concerning the termination of their employment relationships naturally are cases where "the claim is founded upon some incident of the employment relation" as that phrase is used in the definition of a minor dispute in *Elgin.* 325 U.S. at 723. They offer no support for the Union's assertion that the state law property damage claim in this case is a minor dispute.

The remaining cases cited by the union are equally inapposite since they all are inextricably intertwined with the employment relationship. For example, *de la Rosa Sanchez v. Eastern Airlines, Inc.,* 574 F.2d 29 (1st Cir. 1978) involved a pilot's assertion that he had not received all of the disability pension payments to which he was entitled. Patently, this was a claim incidental to employment and

obviously was a dispute which would involve the Court in interpreting the contract. In *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D.Md. 1981), the dispute concerned the actions of supervisors in questioning the employee as to whether he had committed a theft on the job. Disputes concerning actions of supervisors in investigating rule violations or imposing discipline for violations are classic grievances that clearly should be resolved through the arbitration process. Of course, no such grievable matter is involved in the railroads' property damage claim herein. Similarly, the cited case of *Carson v. Southern Railway Co.*, 494 F.Supp. 1104 (D.S.C. 1979) also arose from an alleged violation of a disciplinary rule. The plaintiff therein claimed he had been defamed because a supervisor charged him with a violation of a rule against drinking on duty. This too is a classic grievance situation which is wholly unlike the claim at issue herein. And finally, the case of *Louisville & Nashville Railroad Co. v. Marshall,* 586 S.W.2d 274 (Ky.App. 1979), the employee sued on the theory that a poor performance evaluation was defamatory. The case gives no surcease to the petitioners because it too involved a matter which, unlike the claim herein, was clearly an incident of the employment relationship. Thus, it can be seen that none of these cases cited by the Union is of the slightest precedential value on the issue of whether the railroads' chose in action is pre-empted by R.L.A.

The claim filed by the railroads does not arise from any incident of an employment relationship. It is merely a fortuity that the property damage was caused by the negligence of an employee. Even more significantly, the litigation of the property damage claim will not involve any interpretation of a collective bargaining agreement and will not be within the peculiar expertise of the Adjustment Board. Rather, this is the type of issue which is constantly being litigated in federal district courts. West Virginia tort law governs the claim, and there is no reason in the Railway Labor Act itself, in the case law, or in our national labor policy to take this claim out of the jurisdiction of the district court. The claim therefore cannot be considered to be pre-empted by the Railway Labor Act.

## CONCLUSION

Because the arguments advanced in the proposed brief *amicus curiae* are either duplicative of arguments already presented to the Court or are wholly meritless, the Motion for Leave to File Brief *Amicus Curiae* should be denied.

Respectfully submitted,

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By _____
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## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing response to Motion for Leave to File Brief Amicus Curiae by mailing true copies thereof by depositing the same in the United States mail, postage prepaid, at Huntington, West Virginia, on the 12th day of July, 1984, to:

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